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A

SELECTION

OF

PRECEDENTS,

FROM THE

BEST MODERN MANUSCRIPT COLLECTIONS,

AND

Drafts of Actual Practice;

WITH

GENERAL COMMON FORMS AND VARIATIONS

ADAPTED TO ALL THE CIRCUMSTANCES USUALLY OCCURRING;

FORMING A

SYSTEM OF CONVEYANCING;

WITH

DISSERTATIONS, AND PRACTICAL NOTES.

32/49 E

The Second Edition,

BY

THOMAS JARMAN, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

IN CONTINUATION OF THE WORK OF THE LATE

W. M. BYTHEWOOD, Esq.

VOL. V.

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TO THE

SECOND EDITION OF THE FIFTH VOLUME.

THOUGH the demand of a new Edition of the present Volume came upon the Editor rather unexpectedly, and when his attention was much pre-occupied, he has carefully revised the Volume, and made such additions to the notes as recent cases have suggested, and such corrections in both the precedents and notes, as revision, however often repeated, scarcely ever fails to supply. In this labour, and in the more arduous task of carrying on the original work to a conclusion, the Editor has been encouraged by its favourable reception, as well as by the disposition zealously and liberally manifested by several gentlemen, quite unknown to him, to promote the utility of an undertaking from which they deemed some advantage had been derived by the Profession.

THOMAS JARMAN.

6, *Pump Court, Temple,*
December 16th, 1831.

CONTENTS.

LEASES—*(continued)*.

Lease of a Farm by Husband and Wife, under a general Power of Appointment, reserving Rent a Quarter in advance, and containing, in addition to ordinary Clauses relating to Repairs, Insurance, &c., numerous Special Provisions respecting the Mode of Husbandry; Lessee to make Compensation for Dilapidations at the End of the Term, according to a Valuation. - - - *Page* 1

Of a farm by husband and wife, under a general power.

Lease of a Coal Mine and Clay Pit, by a Mortgagee in Fee, in pursuance of a Power to two Lessees as Tenants in common, with usual Powers of entering upon Lands for the Purpose of making Shafts, &c. they compensating Tenants for Injuries done. Liberty to dig Clay and make Bricks. Reservation of Surface Rent for Land occupied,—of Royalty for each Ton of Coals worked (except for Use of Colliery), with certain Fluctuations, according to Market Price. Not less than a specific Quantity of Coals to be raised. Reservation and Provisions in respect of Deficiency in stipulated Quantity. Reservation of Royalty for Coke and Bricks made. Provision in case of partial Failure of Mine, or Suspension by Accident, &c. Lessor to be at liberty to use Shafts made by Lessees in working Mines not demised. Abatement of Surface Rent in respect of Land used by Lessor. Provision for the Event of Mine being worked out. Clause fixing Proportions of different Species of Coals to be raised. Mode of ascertaining Quantities raised. What Coals to be made into Coke. Liberty to Lessees to remove Engines, &c. at the End of Term, unless Lessor choose to purchase them. Also to cut Timber on giving Notice. Rent to be payable

Of a coal mine, &c. by a mortgagee under a power.

by Bills of Exchange, &c. Covenants by Lessees to raise a certain Quantity of Coals;—to fence the Lands;—not to carry away Brick Clay;—to erect Weighing Machine;—to observe certain Regulations in working Mines;—to keep Premises in Repair;—deliver up Shafts, &c. in serviceable Condition;—if required, to fill up Pits, and restore Land to fitness for Cultivation;—that Lessor shall be at Liberty at the End of Term to purchase Machinery. Usual Clauses as to keeping and delivering Accounts Quarterly. Right of Entry to Lessor to inspect Mines.—Restriction on assigning or under-letting in Parcels.—Power of Distress.—Condition of Re-entry on Failure to work Mines, &c.—Lessor to allow Compensation for Pit Eye Pillars left in Pits. If Lessor shall be willing to let reserved Mines of Iron-stone and Heathen Coal, same to be offered first to Lessees.—Agreement to refer Disputes to Arbitration. Covenant by Lessees to erect a blast Furnace on Ground purchased of Lessor. (Variations (in Notes) where Lands, under which the Coal Mines are situate, are included in the Lease. Power to get all Mineral Substances for Purposes of Colliery, and a certain Quantity of Brick Clay and Limestone for Sale. Reservation of an aliquot Share of the gross pecuniary Proceeds of Coals worked. Power of Entry to Lessees within a certain Period after End of Term to remove Machinery. Covenant by Lessees to fill up Pits, and cultivate the Surface—to supply Lessor's Agent with Coal gratis. Proviso making Lease void on Alienation, Bankruptcy, &c. Covenant by Lessor to let other Lands that may be wanted, and for that Purpose to determine existing Tenancies—that Lessees may relinquish the Possession of Lands:—with Variations in some other Particulars). *Page* 16

Of a mill and farm, part freehold and part copyhold.

Lease from Devisees, in pursuance of a Power, of a Water-mill and Farm, partly Freehold and partly Copyhold. Reservation of Right of Entry to cut Timber, (the Trees themselves being not excepted in the Demise); *Habendum* as to Freeholds for —— Years, determinable on a given Day after the Decease of

Testator's Widow; *Habendum* as to Copyholds for one Year, and, if the Custom of the Manor permit, from Year to Year during the said Term. Last Half Year's Rent reserved to be paid on a given Day before the Termination of the Lease. Covenant by Lessee to repair Mill, &c.—by Lessor, at the End of each Year, to execute a Lease of the Copyholds for one Year. - - - *Page* 69

Lease of a Public-House to two Persons, by the Owner of the Inheritance, and the Trustees of a Term, (subject to Cesser), with the Consent of a Person to whom the Lease was originally contracted to be granted. Special *Reddendum* to Termors until the Cesser of the Term, and then to the Owner of the Inheritance. Rent to be paid to Owner until notice. Usual Covenants by Lessees to pay Rent, make Repairs, not to carry on offensive Trades, &c., also to conduct the House in an orderly Manner, and annually renew the Licence. Covenant by Owner for quiet Enjoyment, and to pay Taxes, (exclusive or inclusive of improved Value), and allow Lessee to deduct them out of the Rent. - - - - 82 — Of a public-house, by owner and trustees of a term.

Husbandry Lease by Tenants in common, at an entire Rent. Additional *Reddendum* for Monies expended by Lessors in insuring Buildings from Fire;—also for Breach of Rules of Cultivation. Proviso for Re-entry on Non-payment of Rent, Alienation, Bankruptcy, &c. Covenants by Lessee, (in addition to the usual Covenants), to pay Rent and Taxes, make Repairs, &c.—not to bring any Combustibles upon the Premises so as to invalidate Fire-Insurance; also to build a Barn. Agreement that in case Buildings are destroyed by Fire, they shall be rebuilt by Lessor, and in the meantime a Deduction made out of the Rent. Liberty to Lessee to purchase the Inheritance at the end of the Term, at a Valuation. (Variations (in Notes) where several Rents are reserved to the Lessors, as distinct Owners). - - 93 — Husbandry lease by tenants in common.

Lease by Husband and Wife seised in her Right under — By husband and

wife and by tenant in tail under stat. 32 Hen. 8. — Stat. 32 Hen. 8, c. 28. (Variations where the Lease is by Tenant in tail, by virtue of this Statute). *Page* 108

By the committee of a lunatic. — Lease for a Term, determinable with Lives, executed by the Committee of a Lunatic under the Direction of the Lord Chancellor. - - - 114

By a guardian and ward. — Lease of a Mansion-house, Furniture, and Park and Deer, by a Minor and his Guardian, with special Provisions as to the Preservation and Management of the Deer. Agreement, that if, by the Diminution or Increase of the Stock, the Deer shall be of less or greater Value, at the End of the Term, the Difference in Value to be paid by Lessee or Lessor, as the case may be. - - - - 116

Of a right of way. — Lease of a qualified Right of Way, at a certain Rent, with an additional Rent for every Occasion in which the Way shall be used for certain Purposes. Covenants by Lessee to pay Rents—Not to erect any Building on adjoining Premises, belonging to him, above a certain height—Not to use the Way for the before-mentioned Purposes. Power to Lessor to distrain for Rents on Lessee's adjoining Premises—also to determine Lease in case of Non-payment of Rent, or if Lessee should erect any Building contrary to his Covenant. - - - - - 122

Of a rectory. — Lease of an Impropriate Rectory, from the Warden and Minor Canons of St. Paul's Cathedral, London, for Twenty-one Years, excepting the Parsonage-house, &c. - - - - - - 129

Theatrical free admission ticket. — Grant or Lease of a Silver or Free Admission Ticket to the King's Theatre or Opera House, for sixteen Years. - - - - - 134

LETTER OF ATTORNEY. 138

To receive a debt in the West Indies. — Letter of Attorney to receive a Debt in the West Indies. (With Affidavit of Execution, &c.) - - 143

Letter of Attorney, (with Affidavit and Mayor's Certificate), by a Plaintiff in a Cause in the Court of Chancery, in Jamaica, to a Person there, to receive an Annual Sum of Money, payable by an Order of Court; and generally to represent him in the Cause. *Page* 148 — To receive monies payable under an order in Chancery in Jamaica.

Letter of Attorney, by two West India Merchants, being in England, to their Partner in Barbadoes, to act for them in all Partnership Transactions. - - 152 — By two merchants, to their partner in Barbadoes.

Letter of Attorney to receive a Legacy, with Power to consent to an Abatement in case of a Deficiency of Assets: and, if required, to give a Bond to the Executors to refund. - - - - 156 — To receive a legacy.

Letter of Attorney to receive the Freight of a Ship. 158 — To receive freight.

Letter of Attorney to take Possession of Estates and other Property in Great Britain, the West Indies, and the United States of North America; and to let and sell the same, and receive Rents and Purchase-money, and to settle Accounts, receive Monies, compound Debts, submit Disputes to Arbitration, with Power to substitute other Attornies. - - - 159 — General power to manage affairs.

Letter of Attorney from a Merchant, having large Estates in England, previously to his going abroad, containing very extensive and special Powers to demise and manage Estates, appoint Bailiffs, exercise Powers of Entry, &c. in Leases, proceed against Tenants, &c. collect Rents, settle Debts, bring Actions, refer to Arbitration, sell, mortgage, or charge the Estates in Great Britain and in Saint Vincent, and grant Annuities, and otherwise to act in his Concerns. (Addition where another Attorney is appointed, in the Event of the Decease of the first). - - - 162 — To lease, charge, and sell estates, and pay debts, raise money by way of annuity, &c.

Letter of Attorney by Devisees and Executors in England, authorizing certain Persons in Granada to take Possession of, and receive the Property and Debts of the Testator there. - - - 173 — By executors to take possession of property, &c.

Letter of Attorney to execute an Indenture. - - 175 — To execute an indenture.

Appointment of substitutes under a letter of attorney. Letter of Attorney, appointing two Persons jointly and severally as Substitutes, by virtue of an Authority in a Letter of Attorney. - - *Page* 176

By trustees for sale, under an express authority to appoint attornies. Letter of Attorney executed by Trustees for Sale of an Estate in Jamaica, to certain Merchants resident there, to enter upon and dispose of the Trust Property, pursuant to the Trusts of the Deed, which contained an express Authority to appoint Attornies for the purpose. - - - - 177

LETTERS PATENT.

Letters patent. Letters Patent granting the exclusive Property in a new Invention. - - - - 182

LICENSE.

License by a patentee. License by the Patentee of a new Invention by Deed-poll, to cease on the Death of the Licensee, or on Alienation, &c. - - - - - 187

License by a patentee. License by Patentee of the exclusive Liberty to use Invention within a certain District, and containing some special Provisions. - - - - 189

License by a patentee. License by Patentee to Two Persons, Partners, for a certain Term; with a Power of Distress for the annual Sum agreed to be paid by Licensees; and special Restriction on Alienation, &c. - - 194

LICENSE, LETTER OF.

Letter of license. Letter of License by Creditors. - - - 198

LIMITED LETTERS OF ADMINISTRATION.

Limited letters of administration. Limited Letters of Administration with the Will annexed, *de bonis non*, granted by the Prerogative Court of the Archbishop of Canterbury, for the purpose of assigning a Term, (the Executors being dead). - 201

Limited Administration of a Term of Years, a former general Administration, *durante minoritate*, having ceased by the Death of the Minor. - *Page* 207 — Limited letters of administration.

MEMORIALS. 211

Of a Lease. - - - - 219 — Of a lease.

Of an Assignment of Lease. - - - 221 — Of assignment of lease.

Of an Assignment by Deed-Poll, indorsed on Lease. 222 — Of assignment by deed-poll indorsed on lease.

Of Conveyance in Fee to a Purchaser by Lease and Release. - - - - 223 — Of lease and release.

Of an Indenture declaring the Uses of a Fine. - 224 — Declaration of uses of fine.

Of an Assignment of Term to attend the Inheritance, (written under the Memorial of the last Deeds). 225 — Assignment of term to attend.

Of Mortgage by way of Under-lease, registered at the same Time as the Lease, and written under the Memorial thereof. - - - 226 — Mortgage by way of under-lease.

Of Mortgage in Fee, by Lease and Release. - 227 — Mortgage by lease and release.

Of Certificate of Satisfaction of Mortgage applicable to the preceding Indenture. - - 228 — Certificate of satisfaction of mortgage.

Of a Grant of Annuity. - - - 229 — Grant of annuity.

Of a Judgment. - - - - 230 — Judgment.

Of a Will. - - - - 231 — Of a will.

MORTGAGES. 232

Mortgage by Demise of a Messuage, with common Clauses, including a Covenant to insure against Fire, and to produce Receipts for Premiums, &c. - - 237 — Mortgage by demise, with usual clauses.

In fee by lease and release. Mortgage in Fee by Lease and Release, with usual Clauses, including a Power to the Mortgagee to make Leases. (Variation where Mortgage is made to secure a Debt already due and future Advances. Also where a Power of leasing is given to the Mortgagor). - - - - *Page* 244

Appointment and release in fee, with power of sale. Mortgage in Fee by Appointment, with usual Clauses, and a Trust for Sale in Default of Payment. (Variations in Notes where a Release is added to the Appointment, and where the Principal is payable at a future Day, with Interest half-yearly in the mean Time). - - - - 255

Appointment and demise, with an assignment of life-policy. Mortgage for a Term of Years by Appointment and Demise, and Assignment of a Policy of Life-insurance to two Persons jointly, (being Trustees): Principal payable at a future Day, and Interest Half-yearly, in the mean Time. (Variation, where the Loan is of Stock in the Public Funds). - - 266

Mortgage in fee by husband and wife. Release in Fee, by way of Mortgage, and Covenant for a Fine by Husband and Wife of the Wife's Lands, with Limitation of the Equity of Redemption to the Appointment of the Husband and Wife, and, in Default, to them in Fee. (Variation where Mortgage is for a Term). - - - - 278

Bankers' security for floating balance. Release in Fee upon Trust for Sale to Bankers, for securing floating Balance of Account current. (Variations where the Security extends to the Partners for the Time being of the Banking-house; Also where it is limited to a definite Sum). - - 287

Assignment of leasehold messuage, &c. Assignment of a Leasehold Messuage by way of Mortgage. Covenant to keep on foot Policy of Fire-insurance, pay Rent, and perform Covenants in Lease, &c. 299

Assignment of renewable leaseholds. Assignment of Renewable Leaseholds, with usual Covenants, including Covenant to renew Lease. Also Assignment of Policy of Fire-insurance.—Agreement by Mortgagee to accept a reduced Rate of Interest on punctual Payment. - - - 305

Mortgage of unfinished Leasehold Houses, where the Money is to be advanced by Instalments as the Building proceeds. Also Assignment of Policy of Insurance—Authority to sell in Default of Payment, with usual Indemnities to Purchasers, &c. and Covenants. Power to Mortgagee to enter and complete Buildings. (A short Form). - - *Page* 324 — Builder's mortgage by assignment.

Under-Lease with Trust for Sale, as an additional Security for a Debt antecedently secured by Bond, and to insure the Payment of Rent and Performance of Covenants of original Lease. Covenants by Mortgagor to pay Rent, and perform Covenants of original Lease until a Sale. Also for Title, and further Assurance, specially adapted to the Case of an Underlease made saleable. Covenants by Mortgagee, that Money shall remain on Security for Seven Years, Interest, Rents, &c. being paid;—By Mortgagor, not to redeem for a certain Period. Declaration negativing implied Warranty of Title by Mortgagor as to Purchasers. - - - - 342 — Under-lease, with trust for sale.

Covenant to surrender Copyhold of Inheritance by way of Mortgage. (Variation where there is a prior Mortgage). - - - - 352 — Covenant to surrender copyholds by way of mortgage.

Conditional Surrender out of Court of a Copyhold of Inheritance. (Bond accompanying this Precedent). 358 — Conditional surrender of copyholds of inheritance.

Deed accompanying a Conditional Surrender of Copyholds, whereby the Mortgagor covenants for Payment of the Principal and Interest, and declares Trusts for Sale in Default of Payment. Also Covenants for Title. (Variation where Mortgage is made to a Solicitor as a Security for Costs). - 362 — Copyholds in trust for sale. Security to a solicitor for costs.

Mortgage in Fee, by Appointment and Release, for the Purpose of raising Money to pay the Debts of the last Owner, who devised the Lands to the present Mortgagor charged with Debts, with usual Covenants. - - - - 372 — To raise money to pay debts of devisor.

Fee-farm-rent to several mortgagees advancing in certain shares.

Mortgage by Appointment and Grant of a Fee-Farm-Rent, to several Mortgagees, with usual Covenants. Declaration that Mortgagees have advanced their Money in certain Proportions. (Variation where Principal is to be repaid by Instalments). *Page* 378

To mortgagees in moieties, money paid by order of Chancery.

Mortgage in Fee, by which, the Mortgagees advancing the Money in equal Proportions, the Estate is limited to them in undivided Moieties. (Variation where each Mortgagee takes a Term in one Moiety and the Fee in the other). Mortgage Money paid into the Bank of England in the Name of the Accountant-General, pursuant to an Order of the Court of Chancery. 388

Reversion in fee to a trustee for sale.

Conveyance by way of Mortgage of a Reversion in Fee in certain Manors, &c., to a Trustee of Mortgagee to secure 5,000*l.* and Interest, and if not paid according to the Proviso, in Trust to sell the Estate and pay the Mortgage Money and Interest. - - 393

Further charge after conveyance in trust for sale.

Further Charge on Premises comprised in the preceding Security, and Declaration that the Trusts for Sale, &c. therein, may be exercised for raising Money secured by present Deed. - - - 400

By tenants for life, with life insurance.

Mortgage by Two Tenants in common, for Life, by Demise, for Ninety-nine Years, determinable with their respective Lives, for securing the Payment of One Hundred and Seventy Pounds and Interest, by Instalments. (Variation, where the Mortgage is of the whole Estate for Life. Also, where an Insurance is effected on the Life of one of the Mortgagors, as a collateral Security). (A very concise Form). 406

Of an equity of redemption.

Mortgage in Fee of an Equity of Redemption, with Covenant to deliver Title Deeds when former Mortgage is paid off, &c. - - - 422

In trust for sale to second mortgagee.

Conveyance in Trust for Sale (subject as to part of the Property to a Mortgage for a Term), to secure the Payment of an existing Debt by Instalments: Trust for Sale to be exercised in case of Non-payment of any Instalment, and also in case of Non-payment of

prior Mortgage Debt, when called in. Prior Mortgage Debt to be paid out of Purchase-Money. *Page* 437

Assignment of Leaseholds to Trustees for Sale, to secure to a Vendor Part of the Purchase-Money remaining unpaid. Vendor's Covenants for Title, &c. - 451 — To secure unpaid residue of purchase-money.

Conveyance in Fee, in Trust for Sale, to secure the Balance for the Time being due to Mortgagees, (a Mercantile Firm), from the Mortgagor's Son, for Goods to be supplied to him upon Credit, (for which the Deeds of the Estate had been antecedently deposited). Joint and several Covenant by Principal and Surety. Usual Provisions, adapted to the case of a Security by a Surety, for a floating Balance to a fluctuating Firm. - - - - 461 — By surety with trust for sale.

Mortgage in Fee, by Tenant for Life and Remainder-Man, for securing 300*l.*, and Interest, subsisting Mortgage Debt being paid off out of the Money now advanced, and Term of one Thousand Years assigned by prior Mortgagee, in Trust to attend the Inheritance, &c., for the Benefit of the present Mortgagee. (Variation where Mortgage Money is secured by Warrant of Attorney). - - - 479 — By tenant for life and remainder-man.

Warrant of Attorney to confess Judgment, and Defeazance. - - - - 484 — Warrant of attorney to accompany mortgage.

Mortgage comprising Freeholds, Leaseholds, and Copyholds; being an Appointment and Release in Fee of the Freeholds, an Under-lease of the Leaseholds, and a Covenant to surrender the Copyholds, with usual Covenants, and Appointment of Receiver. (Variation where the Premises are made saleable in Default of Payment). - - - - - 495 — Freeholds, leaseholds, and copyholds.

Mortgage in Fee by Appointment to a Trustee for Mortgagee; Covenant by Mortgagee not to call in Principal Money for a given Period, the Interest being punctually paid; also by Mortgagor not to pay off — Appointment in fee, with special clauses.

Principal Money until such Time; Power of Distress for Recovery of the Interest. - *Page* 523

Warrant of attorney in ejectment. — Warrant of Attorney to confess Judgment in Ejectment, and Defeazance. - - - 530

Of plantations in the West Indies. — Mortgage in Fee of Plantations in the Island of St. Christopher, to secure a Sum already advanced, and further Advances to be made. Covenant by Mortgagor to consign a certain Portion of the Produce to Mortgagees. Covenant by Mortgagees to make Advances on Consignments in a given Ratio. Power of Attorney to acknowledge Deed for the Purpose of Registry. - - - - 533

In trust for sale of West India estate. — Release in Fee of Plantations, &c. in the Bahamas, to Trustees, (in which a prior Mortgagee joins), Upon Trust for Sale, to secure the Payment of certain Bills of Exchange, which the Mortgagees had accepted for the Accommodation of the Mortgagors, to pay off a subsisting Judgment and Mortgage, and also other Monies to be advanced by Mortgagees for Supplies, &c.; Covenant by Mortgagors to ship and consign Produce to Mortgagees; —— by Mortgagees not to call in Mortgage Money without Notice, while Consignments are regularly made. Indemnity to Trustees. Assignment of Judgment by Creditor, in Trust for the Benefit of Mortgagees, and to attend the Inheritance. Power of Attorney to acknowledge Deed. 544

Of dividends, and reversionary interest of stock. — Assignment of Life-Interest in Dividends of 2000*l.*, 3*l.* *per Cent.* Consols, and Appointment of Reversion in same Stock by Mortgagor's Wife, upon Trusts for Sale, for securing a Sum of Money and Interest; Usual Power of Attorney, Covenants, &c.; Recital of Policy of Insurance, effected by Mortgagee on the Life of Mortgagor as a collateral Security; Covenants by Mortgagor to keep Insurance on foot, attend at Insurance Office, &c. - - - 563

PRECEDENTS

IN

CONVEYANCING.

LEASES—(*continued*).

LEASE *of a* FARM *by* HUSBAND *and* WIFE, *under a* GENERAL POWER *of Appointment* (*a*), *reserving* RENT *a Quarter in* ADVANCE, *and containing, in addition to ordinary Clauses relating to Repairs, Insurance, &c., numerous* SPECIAL PROVISIONS *respecting the* MODE *of* HUSBANDRY; *Lessee to make Compensation for* DILAPIDATIONS *at the End of the Term, according to a* VALUATION.

OF A FARM BY HUSBAND AND WIFE UNDER A GENERAL POWER.

THIS INDENTURE, made the 25th day of March, 18—, BETWEEN [*husband*], of &c., and [*wife*], his wife, of the one part; and [*lessee*], of &c., husbandman, of the other part: WITNESSETH, that, in consideration of the yearly rent hereinafter reserved, and of the covenants, conditions, and agreements hereinafter contained on the part of the said [*lessee*], his executors, administrators, and assigns, to be respectively paid, observed, and performed, the said [*husband*] and [*wife*], his wife, in exercise and execution of a general power of appointment, reserved to them jointly by a certain indenture of release, bearing date the —— day of ——, in the year ——, and of all other powers and authorities in anywise enabling them or either of them in his behalf, *Have* demised, leased, and to farm letten, And by these presents *Do* demise, &c. unto the said [*lessee*], his executors, administrators, and assigns,

Parties.

Testatum.

Husband and wife, in pursuance of general power, demise.

(*a*) The lands appear to have been limited to such uses as the lessors should jointly appoint, and, in default, to them in fee.

OF A FARM BY HUSBAND AND WIFE UNDER A GENERAL POWER.

Parcels.

All that and those farm-house, three cottages, two barns, stables, cow-house, sheep-house, sheds, fruit-gardens, orchard, yards, and land, containing in the whole one hundred and seventy acres, be the same more or less, and situated in the parish of ——, in the county of Surrey, as the same premises are now fully and accurately delineated by and described in the plan drawn in the margin hereof; Together

General words.

with all ways, water-courses, advantages, and appurtenances whatsoever, to the same belonging or in anywise

Exceptions.

appertaining, (except and always reserved out of this present demise unto the said [*husband*] and [*wife*], his wife,

Mines.

their heirs, appointees, and assigns, all mines, minerals, and fossils whatsoever, and all pits for digging or getting gravel, marl, clay, or other materials, in, or upon, or under the said demised premises, or any part or parts thereof;

Fruit, timber, and other trees.

And also (*a*) [all fruit-trees, timber and timber-like trees, pollards, and all timber-plants, (both seedlings and saplings), and all the side branches and tops, except such of the side branches as grow from the body of the timber trees only, within twelve feet of the ground in which the trees stand or grow, and the bodies of all willows now growing, or which may hereafter grow in the land hereby demised, and all other trees whatsoever, with] free liberty of ingress, egress, and regress, to and for the said [*husband*] and [*wife*], his wife, their heirs, appointees, and assigns, and their, or either of their, or any of their workmen and servants, horses and carriages, from time to time, and at all times during the said term, to come into and continue upon the lands hereby demised, or any part thereof, to grub up, cut down, peel off the bark of, hew, saw, manufacture, and carry away the [said] timber-trees, willows, pollards, and other trees, (except the fruit trees), (*b*) [and the bark and branches thereof, whether made into faggots and bavins or not,] doing as little injury to the grass and crops, and other property of the said [*lessee*], his executors, adminis-

(*a*) If the trees are not excepted, according to the suggestion before made, *ante*, Vol. 4, p. 528, the words in brackets may be omitted.

(*b*) If the words in brackets are omitted, add here—

"now growing, or which may hereafter grow upon the said demised lands, except such of the side branches," &c. *ut supra*.

OF A FARM BY HUSBAND AND WIFE UNDER A GENERAL POWER.

trators, or assigns, upon the said demised premises, as reasonably may be, and making compensation to him or them for such damage as shall be done thereby; To HAVE AND TO HOLD the said farm-house, cottages, land, and all and singular other the premises hereby demised, or intended so to be, with their appurtenances, unto the said [*lessee*], his executors, administrators, and assigns, henceforth, for the full term of twenty-one years, to be computed from the date of these presents; YIELDING AND PAYING therefore, yearly and every year during the said term, unto the said [*husband*] and [*wife*], his wife, their heirs, appointees, or assigns, the rent of 500*l.* of lawful British money, in even portions, quarterly, on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December in every year, clear of all deductions for present and future taxes, or on any other account whatsoever; the first of the said quarterly payments to be made on the day of the date of these presents, the next of the said quarterly payments on the 24th day of June next, and so on from quarter to quarter, (the said rent being always in this manner payable on the first day of each current quarter), until the 25th day of December next preceding the expiration or determination of the said term, on which day the last of the said quarterly payments is to be made (*c*);

Habendum.

Reddendum making rent payable at the commencement of each quarter.

(*c*) Where rent is made payable, as in this instance, a quarter in advance, care should be taken that the demise terminates the day before, and not on one of the days of payment; or, if not, that a clause, as above, is introduced excluding the operation of the *reddendum* in regard to that day; otherwise the rent would, by the terms of the lease, be payable twice for the same quarter. Thus, if a lease were granted on the 31st of March, for a term to commence from the 25th day of that month, and the rent was made payable on the usual quarterly days during the term, the first payment to be made on the execution of the lease, and so on, from quarter to quarter, to the end of the term, it is obvious that, as the lease would determine on the 25th of March, one of the days of reservation, a quarter's rent would be payable on that day for the quarter then just entered upon, for which there would be no enjoyment. This is doubly provided against in the precedent above given, as the lease would terminate on the 24th of March, and the rent is expressly made to cease on the preceding 25th of December. In *either* of these cases the lessee would be safe.

As to making rent payable in advance.

OF A FARM BY HUSBAND AND WIFE UNDER A GENERAL POWER.

AND ALSO YIELDING AND PAYING therefore, yearly and every year, unto the said [*husband*] and [*wife*], his wife, their heirs, appointees, and assigns, (over and above the said yearly rent of 500*l.* hereinbefore reserved), the additional rent or sum of 30*l.* of lawful British money, for every acre of meadow or pasture-ground hereby demised, and marked "meadow" in the plan drawn in the margin hereof, of which the said [*lessee*], his executors, administrators, or assigns, shall pare off the turf or destroy the herbage, or which he or they shall plough, break up, or convert into tillage (*c*), or which shall be poached injuriously by cattle while the land is in a wet state, or which shall be mowed more than once in any one year, contrary to the covenant in that behalf hereinafter contained, and so in proportion for any less quantity than an acre of land; the first payment of such additional rent or reservation to be made on the first of the aforesaid days of payment of rent, which shall next happen after any such act or acts as aforesaid shall be done in breach of the said covenant, and the same additional rent or reservation to continue to be paid during the remainder of the said term hereby granted. AND the said [*lessee*], for himself, his heirs, executors, administrators, and assigns, hereby covenants and agrees with the said [*husband*] and [*wife*], his wife, their heirs, appointees, and assigns, that the said [*lessee*], his executors, administrators, or assigns, will duly pay or cause to be paid unto the said [*husband*] and [*wife*], his wife, their heirs, appointees, and assigns, the said yearly rent of 500*l.* hereby reserved; *And also* the said additional or contin-

Additional *reddendum* for ploughing meadow.

Lessee's covenants:—

To pay rent;

And also addi-

What change of cultivation constitutes waste.

(*c*) The conversion of pasture or wood land into arable, and *e converso*, is waste, on the ground not only that it varies the course of husbandry, but changes the identity. Dy. 37 a; Co. Litt. 53. b. The description of the land in the lease as one species or the other, may be considered as *primâ facie* evidence of its being of that quality at the time of the demise; but this has been decided not to preclude the lessee from shewing the contrary, namely, that land described as meadow was actually arable, or *vice versâ*. *Skipwith* v. *Green*, 1 Stra. 610. (The contrary has sometimes been inaccurately stated, as having been decided in *Birch* v. *Stevenson*, 3 Taunt. 469). The mode here adopted of declaring what land is to be considered as meadow, &c., precludes the possibility of any dispute upon the subject.

OF A FARM BY H USBAND AND WIFE UNDER A GENERAL POWER.

gent rent or rents, (if the same shall become payable), at the days or times and in manner hereinbefore appointed for payment of the same respectively, and according to the true intent and meaning of these presents; and will also bear and pay all taxes, rates, assessments, and impositions, Parliamentary and parochial, assessed, taxed, or imposed, or to be assessed, taxed, or imposed, upon or in respect of the said demised premises, or any part thereof, (the land-tax, which has been redeemed, only excepted); *And also*, that the said [*lessee*], his executors, administrators, or assigns, will, at all times during the said term, at his or their own costs and charges, well and sufficiently uphold, repair, maintain, amend, glaze, pave, paint, white-wash, paper, cleanse, scour, empty, and keep the said farm-house, and the said cottages, and all the barns, stables, outhouses, and buildings of every description, and all walls, banks, bridges, pools, ponds, posts, gates, rails, stiles, hedges, fences, water-courses, privies, cesspools, sinks, drains, wells, and roads belonging to the said demised premises, in all needful and necessary reparations, cleansing, painting, banking, emptying, and amendments whatsoever; (after the said buildings, gates, posts, rails, and fences, have been put into tenantable repair by the said [*husband*] and [*wife*], his wife); And shall and will drain, either by open or covered drains, all such parts of the land hereby demised, as shall be anywise in want of it, from time to time, as often as occasion shall require, (the said [*husband*] and [*wife*], his wife, their heirs, appointees, and assigns, on being thereunto required, finding or allowing on the said premises all rough timber for the doing thereof, or allowing the amount of the costs of the same materials within five miles of the premises hereby demised, as hereinafter mentioned, in case the same shall be found by the said [*lessee*], his executors, administrators, or assigns); *And also*, that it shall be lawful for the said [*husband*] and [*wife*], his wife, their heirs, appointees, and assigns, or their or any of their agents, with or without servants, workmen, or others, at all reasonable times of the day, during the continuance of this demise, to enter into or upon the said demised lands, and every or any part thereof; *And also*, four times in every year during this demise, to enter into or upon the

tional and contingent rents;

To pay taxes;

To make repairs;

To drain the land;

That lessors may enter upon land to examine its condition;

And four times in every year

OF A FARM BY HUSBAND AND WIFE UNDER A GENERAL POWER.

said demised buildings, and every or any part thereof, in order to view the state and condition of the said premises, giving unto the said [*lessee*], his executors, administrators, or assigns, three days' previous notice of their, his, or her intention so to do; And in case they, he, or she shall find any want of repairs, neglects, decays, defects, or want of cultivation in or on any part of the said demised premises, and shall leave notice in writing under his, her, or their hand or hands, on the said premises, requiring the said [*lessee*], his executors, administrators, or assigns, to make good the same, by repairing, walling, fencing, banking, draining, manuring, ploughing, harrowing, extirpating weeds, or otherwise properly cultivating and upholding the said demised premises, as the said notice may require, then the said [*lessee*], for himself, his heirs, executors, administrators, and assigns, hereby covenants and agrees with the said [*husband*] and [*wife*], his wife, their heirs, appointees, and assigns, to do the things required, at the proper costs and charges of the said [*lessee*], his executors, administrators, or assigns, accordingly, within three calendar months from the time of leaving such notice; *And also*, that, at the expiration or other sooner determination of the said term, the said [*lessee*], his executors, administrators, or assigns, will peaceably and quietly yield and deliver up unto the said [*husband*] and [*wife*], his wife, their heirs, appointees, or assigns, the said demised premises, and all articles and things belonging thereto, and all the doors, wainscots, partitions, bolts, bars, staples, hinges, chimney entablatures, mantles, jambs, coverings, hearths, slabs, locks, sinks, pipes, glazed lights, casements, sashes, windows, shutters, closets, and shelves, in, upon, or about the said demised lands and premises, or in or upon any building which may be erected thereon, the same being as aforesaid in all things well and sufficiently cultivated, upheld, repaired, maintained, glazed, painted, paved, papered, whitewashed, cleansed, scoured, emptied, and kept, (reasonable use and wear thereof excepted); *And also*, that the said [*lessee*], his executors, administrators, or assigns, shall and will, at his or their own costs and charges, insure and keep insured the said farm-house, cottages, barns, stables, and all other buildings in or upon the said demised pre-

enter upon the buildings.

Covenant by lessee to repair premises according to notice;

To leave same repaired.

To insure against fire;

OF A FARM BY HUSBAND AND WIFE UNDER A GENERAL POWER.

mises, against loss or damage by fire in the sum of 3000*l.* at least, during the continuance of this present demise, and will regularly produce to the said [*husband*] and [*wife*], his wife, their heirs, appointees, or assigns, if required so to do, the receipts for the premiums of insurance, in order to shew that such insurance is made and continued (*d*); and that in case any accident by fire shall happen to the said demised premises, the money that shall thereupon become payable in respect of the said insurance, shall be applied in making good the damage which shall have been sustained by the said premises; but the yearly rent hereby reserved, or any part thereof, shall not be discontinued, but shall be paid as if no such accident had happened; *And also*, that the said [*lessee*], his executors, administrators, or assigns, shall and will conform to such

And produce receipts.

To apply insurance money in rebuilding.

Rent not to be discontinued.

Course of husbandry.

(*d*) "*And* if the said [*lessee*], his executors, administrators, or assigns, shall neglect to insure and keep insured the said farm-house, cottages, barns, stables, and other buildings hereby demised, or to produce the receipts for the premiums and other costs and charges of such insurance, pursuant to his covenant hereinbefore contained, then and in such case the said [*husband*] and [*wife*], his wife, their heirs, appointees, or assigns, shall be at liberty to insure the same in their own names, for any sum of money not exceeding the said sum of 3000*l.*; and the amount of the premiums, costs, and charges of such insurance shall be paid to them by the said [*lessee*], his executors, administrators, or assigns, and in default of payment thereof shall be chargeable on the said premises in the nature of rent, and shall be recoverable by distress, in the same manner as in case of the non-payment of the rent reserved and made payable by these presents."

Power for the landlord to insure, and to recover the monies paid by him by distress, &c.

Where a power to this effect is given, it seems to be proper to add a covenant on the part of the lessor to rebuild the premises, in case the same shall be burnt down during the continuance of any policy effected by him in pursuance of the power; and this is the more necessary when the rent is not to be suspended; in such a case, it seems to be proper to make the lessor covenant to rebuild within a given time.

OF A FARM BY HUSBAND AND WIFE UNDER A GENERAL POWER.

a rotation of cropping all the arable lands, as shall make it produce two or more crops of tares, turnips, potatoes, cole, cabbages, clover, peas, or beans, for each crop of corn, in the doing of which he and they will as much as possible adhere to the rotation of—first, tares; second, turnips; third, corn; to which he or they may occasionally add either clover, cole, (for sheep feed, but not for seed), or potatoes; or a variation may be—first, tares or turnips; second, corn; third, clover: the tares may be sowed either broad cast or in rows, and in either case they shall be twice hoed or weeded by hand; and the turnips, as well as the cole, cabbages, and potatoes, shall in every case be sown or drilled in rows, on land which has been well cleansed by repeated ploughing and harrowing, which land shall also be manured for the turnip, cole, and potatoe crops, and the plants shall be at least twice hoed: And will, during the whole term hereby granted, in a good and husbandlike manner, place in the buildings and stack-yards hereby demised, all the corn, hay, beans, and peas, and continue them there, until the corn, pulse, and other seeds are threshed out; and that he or they will fodder cattle and animals on the premises hereby demised, with the whole of its produce, in such manner as to convert it into manure, or will bring and lay down on the premises one large load of dung for every load of such produce sold or carried of; and which dung, and all the manure, muck, and compost that shall or may be made or collected on the said demised premises, the said [*lessee*], his executors, administrators, or assigns, shall and will place in proper dung-holes upon the said premises, and in a good and husbandlike manner will cause all such dung-holes to be turned once or twice, to promote the putrefaction of them, and the destruction of the seeds of all such weeds, as well as the eggs of such insects as may happen to be there; and when the whole of such dung-hills or mixture is properly rotten or decomposed, will, in the best season for the purpose, carry it to such parts of the land hereby demised as may be most fit to receive it, and spread it thereon in a good husbandlike manner; *And also*, that the said [*lessee*], his executors, administrators, or assigns, will keep all the hedges, fences, banks, drains, and ditches, belong-

To raise crops in a certain order.

To consume straw and hay upon the premises,

or lay down one large load of dung for every load carried off.

To place manure in dung-holes, and turn them.

To spread manure on land.

To keep hedges, &c. in good condition;

OF A FARM BY HUSBAND AND WIFE UNDER A GENERAL POWER.

ing to the said hereby demised premises, in good condition, during the whole of the term hereby granted, and new make one-tenth part of the whole of the said hedges and fences once in every year, and, at the time of such new making the same, will cut down in the proper winter seasons all the bushes, thorns, hazle and stem wood, close to the stump on which the same have grown, (except the necessary number of live stakes, which may be cut at the usual height of stakes, and except such stems of oak, elm, ash, and beech as may be marked by the said [*husband*] and [*wife*], his wife, their heirs, appointees, or assigns, to be saved, and which shall be saved accordingly, and not be cut down); and scour and cleanse the ditches to their ancient depth, and place on the hedge banks all the dead soil obtained by such scouring and ditching, (but not the vegetable mould, which is to be and shall be mixed with the dung-hills); and will at such time make good all the demised banks, hedges, and fences; and will in every year during this demise repeatedly mow or cut down all the thistles which shall grow on any part of the said demised land and hedge-rows, before they are in blossom, so as effectually to prevent their seeding; and will, at all times during this demise, cause all the moles and rats on the demised premises to be destroyed; *And also*, that the said [*lessee*], his executors, administrators, or assigns, will not at any time or times during this demise, cut down, saw down, grub up, or destroy any of the timber-trees, fruit-trees, tellers, wavers, seedlings or saplings, or the bodies of any pollards or willows, nor convert any such trees into pollards by cutting their heads or tops off, nor cut the side branches of any such trees or pollards above the height of twelve feet from the surface of the ground in which they grow, which are now standing or growing, or which shall at any time during the said term be standing or growing upon the said demised premises, or any part thereof; *And that* the said [*lessee*], his executors, administrators, or assigns, shall pay to the said [*husband*] and [*wife*], his wife, their heirs, appointees, or assigns, for every timber-tree, fruit-tree, teller, waver, seedling, sapling, pollard, or body of willow, which shall

and new make one-tenth of the whole annually.

To scour ditches;

make good banks &c.

To cut down thistles;

To destroy moles and rats;

Not to cut down timber, fruit, and other trees.

To pay 20*l.* for every tree cut down.

OF A FARM BY HUSBAND AND WIFE UNDER A GENERAL POWER.

be cut down, sawn down, grubbed up, destroyed, or converted into a pollard as aforesaid, or such cutting the side off as aforesaid, the sum of 20*l.* by way of liquidated damages; *And that* the said [*lessee*], his executors, administrators, or assigns, shall not nor will permit any hogs to go loose on the land hereby demised, without being ringed or otherwise being effectually deprived of the power of turning up the soil, or doing other mischief (*e*): And shall not nor will pare, burn, or carry away any of the surface, or destroy the herbage of any part of the land hereby demised, nor at any time during this demise plough, break up, or convert into tillage any part of the meadow or pasture ground hereby demised, nor wilfully permit the land hereby demised, or any part thereof, to be injuriously poached by cattle while it may be in a wet state, nor plough, dig, or break up any of the hedge-rows nearer the hedge than four feet, nor do or suffer to be done any waste, spoil, or injury to any part of the premises hereby demised, nor in any manner whatsoever impoverish the same, or diminish the fertility or value thereof, by neglecting to cultivate, manure, and cleanse the same in a good and husbandlike manner; *And* shall and will, to the utmost of his or their power, prevent any new foot-paths being made over any of the lands hereby demis-

Not to permit hogs to go unringed.

Not to plough meadow, or injure the surface of the land.

To prevent new foot-paths from being made.

Variation.

(*e*) Sometimes the covenant is to this effect:—

As to the depasturing of beasts.

"nor shall or will permit or suffer any horse, cow, cattle, swine, or other beast, to depasture or go into or upon the said meadows or meadow grounds, or any of them, at any time or times between the 24th day of November and the 24th day of June, or to depasture in, or go into or upon any of the stubble grounds, which now are, or hereafter shall be, of or belonging to the said demised premises, at any time or times between the tenth day of October and the first day of May yearly, in any year during the said term hereby granted, or to depasture or go into or upon any of the courts, gardens, or orchards of or belonging to the said demised premises, at any time or times during the said term."

OF A FARM BY HUSBAND AND WIFE UNDER A GENERAL POWER.

ed (*f*); *And will*, at the end or sooner determination of this demise, leave all the dung, manure, soil, compost, and ashes, which shall be in any manner lodged upon the premises, in proper dung-hills or mixens, and also the dung to be made from the crops which shall or may be grown upon the said premises hereby demised in the last year of this demise, being paid for all such parts thereof as shall have been brought to or made upon the premises hereby demised during the last year of the said term; *And* will, if required, leave on the premises hereby demised, all such parts of the crops of the last year of unthreshed corn, straw, hay, cabbages, and turnips, as shall then remain or be thereon, to be valued at what they may be worth to consume on the premises, or, at the option of the said [*lessee*], his executors, administrators, or assigns, the same may be valued at what they may be worth to be either sold on the premises hereby demised or carried to market, after deducting the amount of a similar valuation of one large load of dung, which should be brought to and left upon the premises hereby demised, for each market-load of thirty-six trusses of hay or straw carried off, which valuation shall be made by two indifferent persons, or their umpire, as hereinafter mentioned; *And* that it shall be lawful for the said [*husband*] and [*wife*], his wife, their heirs, appointees, and assigns, or the succeeding occupiers of the premises hereby demised, at any time or times during the months of March or April in the last year of the term hereby de-

To leave manure upon the premises,

(being paid for the last year's).

To leave last year's crops of corn, &c. being paid according to a valuation.

That lessors may enter before the end of the term, to sow clover, &c.

(*f*) This covenant is sometimes expressed more at large.

" *And further*, that the said [*lessee*], his executors, administrators, and assigns, or any of them, shall not nor will at any time or times during the said term hereby granted, permit or suffer any new or unusual way, road, or passage for any person or persons on foot, or with horses, cattle, carts, or carriages, to be made or used in, upon, through, or over the said demised premises, or any part thereof, or any ancient immemorial way, road, path, or passage of right, in, upon, through, or over the same, or any part thereof, to be increased, enlarged, or encroached upon, by any person or persons whomsoever."

Not to suffer any new way to be made through the lands;

nor any old way to be enlarged.

OF A FARM BY HUSBAND AND WIFE UNDER A GENERAL POWER.

mised, to enter in and sow such clover or grass-seeds, as he or they shall think proper, on such part of the arable land hereby demised as shall not then be sown with corn, and to harrow and roll the same, if he or they shall choose so to do; *And that* it shall be lawful for the said [*husband*] and [*wife*], his wife, their heirs, appointees, or assigns, during the last three months of the term hereby granted, to enter into half the stables, and such of the arable land hereby demised as shall then be cleared of its crops, and upon the dung-hills, (but the dung-hills shall be paid for as hereinafter mentioned), for the purpose of carrying out and using the manure on such land, and for ploughing or otherwise preparing the said land for and sowing it with tares or wheat; And that, ten days before the expiration or sooner determination of the term hereby granted, it shall be lawful for the said [*husband*] and [*wife*], his wife, their heirs, appointees, or assigns, or such person or persons to be appointed in their behalf as hereinafter mentioned, to enter into and upon every part of the buildings and land hereby demised, in order to have a survey made of the state of all the buildings, and of the cleansing, white-washing, papering, and painting thereof, and of the wells, pumps, drains, cesspools, privies, bridgeways, posts, stiles, pales, rails, gates, and the iron-work thereof, and of the walls, hedges, ditches, fences, banks, drainings, manuring, cultivation, and the state of the weeds, trees, pollards, underwood, willows, and alders; such survey to be made by two persons, one of whom to be chosen by the said [*husband*] and [*wife*], his wife, their heirs, appointees, and assigns, and the other by the said [*lessee*], his executors, administrators, or assigns, and in case they cannot agree in their award, then those two persons to choose a third; And if the said [*lessee*], his executors, administrators, or assigns, shall neglect or refuse to appoint a person on his or their part by the space of five days after notice in writing by the said [*husband*] and [*wife*], his wife, their heirs, appointees, or assigns, and left at the dwelling-house of the premises hereby demised, then such survey shall and may be made by one or two competent persons, to be appointed by the said [*husband*] and [*wife*], his wife, their heirs, appointees, or assigns, which person

And also to prepare lands for corn, &c.

That lesssors may enter ten days before the end of term, to make a survey of the state of repairs and cultivation.

Arbitrators to be appointed;

OF A FARM BY HUSBAND AND WIFE UNDER A GENERAL POWER.

or persons so named and appointed as aforesaid shall or may make an estimate or valuation of what it would cost to extripate the weeds, and put all the buildings and land hereby demised into such good order and condition as they ought to be left in, according to the covenant hereinbefore contained, and the said [*lessee*], his executors, administrators, or assigns, shall and will forthwith pay to the said [*husband*] and [*wife*], his wife, their heirs, appointees, or assigns, the amount of such estimate or valuation; *And also*, that the said [*lessee*], his executors, administrators, or assigns, will not at any time or times during the continuance of this demise, assign, underlet or otherwise dispose of or part with the possession of the said demised premises, or any part thereof, or do or commit any act whereby the same, or any part thereof, may be assigned, underlet, or otherwise disposed of, or the possession thereof parted with to any person or persons whomsoever, for all or any part of the said term hereby granted, without the licence or consent in writing of the said [*husband*] and [*wife*], his wife, their heirs, appointees, or assigns, first obtained for that purpose. PROVIDED ALWAYS, *and these presents are upon this express condition*, that if it shall happen that the said yearly rent of 500*l.* hereby reserved, or the said additional or contingent yearly rents, or any or either of them, or any part thereof respectively, shall be in arrear or unpaid for the space of twenty-one days next after any of the said days hereinbefore appointed for payment thereof, being lawfully demanded upon or at any time after the expiration of the said twenty-one days, and not paid when demanded, or if the said [*lessee*], his executors, administrators, or assigns, do not in all things observe, perform, fulfil, and keep all the covenants, conditions, and agreements hereinbefore contained, on his or their parts to be observed, performed, fulfilled, and kept, or if the said [*lessee*], his executors, administrators, or assigns, shall be declared a bankrupt or bankrupts under the laws relating to bankrupts, or shall make a composition with his, their, or any of their creditors, or the major part in number or value thereof, or if any extent, execution, or other legal process shall be issued against him or her, by virtue of which this lease shall be liable to be taken or disposed of, then and at all times afterwards, in all, either, or

to ascertain what it would cost to put premises into repair.

Not to assign or underlet.

Proviso for re-entry on non-payment of rent, breach of covenant, or the lessee being bankrupt, &c.

OF A FARM BY HUSBAND AND WIFE UNDER A GENERAL POWER.

any of the said cases, it shall be lawful for the said [*husband*] and [*wife*], his wife, their heirs, appointees, or assigns, to re-enter into and upon the said demised premises, or into any part thereof in the name of the whole, and to repossess and enjoy the same as in their former estate; and in such case the said [*lessee*], his executors, administrators, or assigns, shall not be entitled to recover back any portion of the rent which shall have been paid by him or them in advance, as aforesaid (*g*). AND the said [*husband*], for himself, his heirs, executors, and administrators (*h*), hereby covenants and agrees with the said [*lessee*], his executors, administrators, or assigns, that it shall be lawful for the said [*lessee*], his executors, administrators, or assigns, (he or they paying the said yearly rent hereby reserved, and the said contingent or additional rent, if the same shall become payable under the reservations and conditions aforesaid, and observing and performing the several covenants, conditions, and agreements hereinbefore contained, on his or their part to be respectively paid, observed, and performed), peaceably and quietly to hold, occupy, and enjoy the said farm-house, cottages, lands, hereditaments, and premises hereby demised, or intended so to be, and every part thereof, during the said term of twenty-one years, without any eviction, interruption, or denial whatsoever, from or by the said [*husband*] and [*wife*], his wife, their heirs, appointees, or assigns, or any other person or persons whomsoever, having, or rightfully claiming, or to claim from, through, under, or in trust for them, or either of them; *And also*, that the said [*husband*] and [*wife*], his wife, their heirs, appointees, or assigns, will, from time to time during this demise, pay or allow out of the rents hereby

Covenant by husband for quiet enjoyment.

(*g*) Some stipulation on this point seems to be necessary.—If it be so intended, a covenant on the part of the lessor to return the rent he may have received in advance, at the time of his entry, should be inserted.

(*h*) It is improper to add,

"and also for the said [*wife*], his wife,"

as occurred in the draft from which this precedent is taken, as the husband cannot bind the wife by his covenant; though the covenant should extend to the acts of persons claiming under her as well as himself.

OF A FARM BY HUSBAND AND WIFE UNDER A GENERAL POWER.

reserved, for all such timber, rough or unwrought, at some convenient timber-yard within five miles of the premises hereby demised, as shall be used in repairs of the demised buildings and premises, the same to be fetched at the expense of the said [*lessee*], his executors, administrators, or assigns; And that, at the end or sooner determination of the term hereby granted, the said [*husband*] and [*wife*], his wife, their heirs, appointees, or assigns, or the succeeding occupier of the said premises, shall and will pay or allow out of the rent or rents then due (*i*), or out of the sum at which any dilapidations shall be valued as aforesaid, such sum of money as shall be settled by the valuation to be made as hereinafter mentioned, to the said [*lessee*], his executors, administrators, or assigns, for the dung-dressings, half-dressings, fallows, half-fallows, seeds, and crops hereinbefore mentioned, to be left by him or them on the premises, for the use of the succeeding tenants thereof, and for the growth of hedges and underwood. And *it is hereby declared and agreed*, by and between the said parties hereto, that the several valuations hereinbefore referred to shall be made by two indifferent persons, one of them to be chosen by the said [*husband*] and [*wife*], his wife, their heirs, appointees, or assigns, and the other by the said [*lessee*], his executors, administrators or assigns; and in case the persons so chosen shall not agree in their award, then they shall choose a third person as umpire; and in case either of the said parties shall neglect, after seven days' notice in writing from the other of them, to choose an appraiser or referee on his or their behalf, then such valuation or valuations shall be made solely by the person nominated by the party giving such notice, and the same shall be conclusive on both the said parties. In witness, &c.

To pay or allow for timber for repairs.

And to pay for dressings and crops at the end of term.

Agreement that valuations shall be made by arbitrators.

(*i*) Without a stipulation to this effect, it is clear that the lessee would not be entitled to set off the value of the crops, to which he may be entitled as off-going tenant, against the rent; and Equity in such a case, following the law, could give no relief, the tenant's claim being founded on a legal demand. *Townrow* v. *Benson*, 3 Mad. 203. He would therefore be compelled to resort to a cross action. See *Doe* d. *Upton* v. *Witherwick*, 10 J. B. Moore, 267.

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

LEASE *of a* Coal Mine *and* Clay Pit, *by a* Mortgagee *in Fee, in pursuance of* a Power (*a*), *to two Lessees as* Tenants in common, *with usual Powers of entering upon*

Utility of powers to lease in mortgages.

(*a*) It is often very convenient to introduce powers of leasing into mortgages, whether such deeds contain powers of sale or not, for it is clear that a power to sell does not, *per se*, include a power to lease. (But see *Jervoise* v. *Clarke*, 6 Madd. 96). Where a person thus authorized to lease has an estate out of which the whole interest included in the demise can take effect, the reservation and covenants may be made simply to and with him, his heirs and assigns, or to and with him, his executors, administrators, and assigns, as the case may be, and not to and with him and the person or persons for the time being entitled to the lands, as in the case of leases granted by tenants for life, whose estate may cease before the determination of the term granted. When the estate is reconveyed to a mortgagor, he takes the benefit of the covenants entered into with the mortgagee, in the same manner as any other grantee or assignee of the reversion.

As to lease of mines.

Where a power to lease mines is given, it should be declared whether the leases are to extend to unopened as well as opened mines. In the absence of such a declaration, the power, it seems, will be confined to the former, particularly if the lessee is to be not dispunishable for waste, since opening mines is waste; *Campbell* v. *Leach*, Amb. 740; but if, where the power authorizes the donee to lease mines already open only, opened and unopened mines are demised together, reserving a portion of the produce, the lease may be good as to one, though void as to the other. *Ibid.* It may also be observed, in regard to mining leases, that the reservation of a portion of the produce has been held to be good in exercise of a power requiring the best "rent" to be reserved, this being the ordinary mode of reservation in mining leases. See *Campbell* v. *Leach*, Amb. 740.

It seems, according to an early authority, that where a lease is granted of land and mines generally, and there are mines open at the time, the demise extends to such mines alone, and the lessee is not authorized to open new mines. *Astry* v. *Ballard*, 2 Lev. 185.

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

Lands for the Purpose of MAKING SHAFTS, *&c. they compensating Tenants for Injuries done. Liberty to* DIG CLAY *and make* BRICKS. RESERVATION *of* SURFACE RENT *for* LAND *occupied,—of* ROYALTY *for each* TON *of* COALS *worked (except for Use of Colliery), with certain* FLUCTUATIONS, *according to* MARKET PRICE. *Not less than a* SPECIFIC QUANTITY *of* COALS *to be raised.* RESERVATION *and* PROVISIONS *in respect of* DEFICIENCY *in stipulated Quantity.* RESERVATION *of Royalty for* COKE *and* BRICKS *made.* PROVISION *in case of* PARTIAL FAILURE *of* MINE, *or* SUSPENSION *by* ACCIDENT, *&c.* LESSOR *to be at liberty to* USE SHAFTS *made by Lessees in* WORKING MINES NOT DEMISED. ABATEMENT *of* SURFACE RENT *in respect of Land used by Lessor.* PROVISION *for the Event of* MINE *being* WORKED *out.* CLAUSE *fixing* PROPORTIONS *of* DIFFERENT SPECIES *of* COALS *to be raised.* MODE *of* ASCERTAINING QUANTITIES *raised. What* COALS *to be made into* COKE. *Liberty to* LESSEES *to* REMOVE ENGINES, *&c. at the End of Term, unless* LESSOR *choose to* PURCHASE *them;—to* CUT TIMBER *on giving Notice.* RENT *to be payable by* BILLS *of* EXCHANGE, *&c.* COVENANTS *by* LESSEES *to* RAISE *a certain* QUANTITY *of* COALS;—*to* FENCE *the* LANDS;—*not to* CARRY AWAY BRICK CLAY;—*to* ERECT WEIGHING MACHINE;—*to* OBSERVE *certain* REGULATIONS *in* WORKING MINES;—*to keep* PREMISES *in* REPAIR;—DELIVER UP SHAFTS, *&c. in serviceable Condition;—if required, to* FILL UP PITS, *and* RESTORE LAND *to fitness for* CULTIVATION;—*that* LESSOR *shall be at Liberty at the* END *of* TERM *to* PURCHASE MACHINERY. USUAL CLAUSES *as to keeping and delivering* ACCOUNTS QUARTERLY. RIGHT *of* ENTRY *to* LESSOR *to* INSPECT MINES.—

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

RESTRICTION *on* ASSIGNING *or* UNDER-LETTING *in* PARCELS.—POWER *of* DISTRESS.—CONDITION *of* RE-ENTRY *on* FAILURE *to* WORK MINES, *&c.*—LESSOR *to allow* COMPENSATION *for* PIT EYE PILLARS *left in Pits. If* LESSOR *shall be willing to* LET RESERVED MINES *of* IRON-STONE *and* HEATHEN COAL, *same to be* OFFERED *first to* LESSEES.—AGREEMENT *to refer* DISPUTES *to* ARBITRATION. COVENANT *by* LESSEES *to* ERECT *a blast* FURNACE *on Ground purchased of Lessor.* (VARIATIONS *(in Notes) where* LANDS, *under which the Coal* MINES *are situate, are* INCLUDED *in the* LEASE. POWER *to get* ALL MINERAL SUBSTANCES *for* PURPOSES *of* COLLIERY, *and a certain* QUANTITY *of* BRICK CLAY *and* LIMESTONE *for* SALE. RESERVATION *of an aliquot* SHARE *of the* GROSS PECUNIARY PROCEEDS *of* COALS WORKED. POWER *of* ENTRY *to* LESSEES *within a certain Period after* END *of* TERM *to* REMOVE MACHINERY. COVENANT *by* LESSEES *to* FILL UP PITS, *and* CULTIVATE *the Surface —to* SUPPLY *Lessor's* AGENT *with* COAL *gratis.* PROVISO *making* LEASE VOID *on* ALIENATION, BANKRUPTCY, *&c.* COVENANT *by* LESSOR *to* LET OTHER LANDS *that may be wanted, and for that Purpose to* DETERMINE EXISTING TENANCIES—*that* LESSEES *may relinquish the Possession of* LANDS;—*with Variations in some other Particulars).*

Parties.

THIS INDENTURE, made the —— day of ——, ——, BETWEEN [*lessor*], of &c., (mortgagee in fee of the mines and hereditaments hereinafter mentioned, and intended to be hereby demised, under and by virtue of a certain indenture of release or mortgage, bearing date the —— day of ——, and made between [*mortgagor*], of the first part; [A. B.], of the second part; and the said [*lessor*], of the third part; whereby the said hereditaments were (with others) conveyed unto and vested in the said [*lessor*] and his heirs, with a general power to demise or

Reference to power.

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

lease the same for any term or number of years, under and subject to such conditions, provisoes, and agreements, as are usual in mining leases, in and about ——— aforesaid,) of the one part, and [*lessees*], of &c., of the other part. WHEREAS the said [*lessor*], as such mortgagee as aforesaid, in consideration of the several rents, royalties, and reservations, covenants, clauses, and agreements hereinafter to be reserved and contained on the lessees' parts, hath agreed to grant a lease to them the said [*lessees*], their executors, administrators, and assigns, of the mine of ten yard coal, and of the common brick-clay, lying and being under the lands and hereditaments hereinafter mentioned or referred to, subject to the reservations hereinafter contained; together with full power of entering upon and occupying such parts of the same lands and hereditaments, as may be necessary for effectually carrying on the works of the said mine, in manner hereinafter contained. NOW THIS INDENTURE WITNESSETH, that, for the purpose of carrying the said agreement into effect, and in consideration of the several rents, royalties, reservations, and sums of money, covenants, clauses, and agreements hereinafter reserved and contained on the part of the said [*lessees*], their executors, administrators, and assigns, to be paid and performed, He the said [*lessor*], in pursuance and by virtue of the power and authority contained in the indenture of release or mortgage hereinbefore referred to, and of every other power or authority enabling him in this behalf, *Hath* granted and demised, and by these presents *Doth* grant and demise unto the said [*lessees*], their executors, administrators, and assigns, ALL the mine, vein, bed, or stratum of ten yard coal, commonly called the ——, and such part of the mine, bed, or stratum of common brick-clay, as the said [*lessees*], their executors, administrators, and assigns, shall want and be desirous of working, respectively lying and being in and under all those twenty-six several closes, pieces or parcels of land, situate, lying, and being at ——, in the parish of —— and the parish of ——, both in the county of ——, aforesaid (*b*), and

Recital of agreement for a lease.

Testatum.

Parcels.

(*b*) Variation, where the lands are also demised, and the lease embraces coal and all other mineral substances, to be used for the purposes

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

which said eighteen several pieces or parcels of land, by an ancient survey and admeasurement thereof, are stated

of the colliery, with liberty to get clay for bricks; containing also other variations:

Lands. "ALL THOSE [*describe lands*]: AND ALSO all and every the mines, depths, and veins of coal, which are now open or known, or which shall or may be found or discovered

Mines under the lands. during the continuance of this demise, within and under the said messuage, pieces or parcels of ground, hereditaments and premises hereinbefore described, and hereby

General words. demised, or intended so to be; Together also with all and singular the ways, waters, water-courses, commodities, privileges, advantages, appendages, rights, members, and appurtenances whatsoever to the said messuage or tenement, buildings, pieces or parcels of land, ground, mines, depths and veins of coal, hereditaments and premises hereby demised, belonging or appertaining, or now used, occupied,

Liberty to dig mines. or enjoyed therewith; *Together also* with full and free liberty, power, and authority for the said [*lessees*], their executors, administrators, and assigns, and their and every of their agents, servants, miners, and workmen, from time to time and at all times during the continuance of this demise, at their will and pleasure, and at their costs and charges, to enter into and upon the lands and premises hereby demised, or any part or parts thereof, and there to dig, bore, delve, sink, search for, raise, get, and work the said mines, depths, and veins of coal, and follow and pursue the same according to the law and customs of

To sink pits, mining used and approved in the county of ——; and for that purpose to sink such and so many pits and shafts, and to drive such and so many headways, levels, and

and erect fire engines. drains, and to erect and set up such and so many fire engines, whimseys, cranks, gins, and other machines, and to use all such other means as shall be found necessary or expedient for raising, getting, and working the said mines, depths, and veins of coal, and for draining, raising, and discharging the water therefrom, in the best manner, and as is usually practised in such or the like cases; and to place, stack up, and lay such coal, and the earth, rubbish, and spoil to be raised out of the said pits or shafts and mines upon the several lands and grounds aforesaid, or

to contain together fifty-one acres and two perches, but, by a new survey and admeasurement lately taken thereof, OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

any of them, or any part or parts thereof; and from time to time to take down the said fire engines, whimseys, cranks, gins, and other machines, erected and set up for the purposes aforesaid, and dispose of the materials thereof as to them the said [*lessees*], their executors, administrators, and assigns, shall seem meet; and to have, take, and carry away at their free will and pleasure, and to convert for and to their own proper use and benefit, all such coal as shall or may be gotten or raised from the said pits, mines, and veins, subject to the covenants and conditions hereinafter contained for regulating the disposition thereof; And also to make such and so many waggon-roads, rail-ways, tram-roads, and other roads and ways in, through, and over the said lands or grounds, to or from the —— canal, or to or from any other convenient place or places of delivery, and to perform all other acts and things for the carrying away the said coals and other produce of the said pits or mines, as shall from time to time be fitting and necessary; and together also with full and free liberty, licence, power, and authority, from time to time, and at all times during the continuance of this demise, at their free will and pleasure, and at their own costs and charges, to raise, dig, and get clay, brick-earth, loam, sand, fire-clay, iron-stone, and other mineral substances and materials, in any convenient part or parts of the said lands or grounds hereby demised, and to make and manufacture the same respectively into bricks and other articles, for the purpose of erecting, building, or constructing in or upon the said hereby demised lands or grounds and premises, or any part thereof, any erections, works, rail-ways, engines, machinery, and other conveniences for the prosecution of the colliery and works intended to be carried on by the said [*lessees*], their executors, administrators, or assigns, pursuant to these presents, and for altering and repairing the same, or otherwise to convert and appropriate the same substances and materials respectively to the use of the said colliery and works; *And also*, in like manner, but subject to the restriction hereinafter contained, to raise, dig, and get clay, brick-earth, loam, sand, and other ma-

To carry away and dispose of the coal.

To make roads and rail-ways.

Also to dig clay, &c. and all mineral substances for the purposes of the colliery.

And also to make bricks for sale;

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

by ——, land surveyor, (which includes the road), they have been ascertained to contain fifty-five acres and one

terials proper for the making of bricks, and to make and manufacture the same into bricks, for the purpose of sale, and to sell and dispose of such bricks; *And also*, in like manner, but subject as aforesaid, to raise, dig, get, and burn limestone, for the purpose of sale, and to sell and dispose thereof; but so nevertheless that the said [*lessees*], their executors, administrators, and assigns, shall not be at liberty to dig and get, for all or any of the purposes aforesaid, any greater quantity of clay, brick-earth, loam, sand, and other materials for the making of bricks and tiles, than shall be yielded and produced by or from five acres of land or ground at the most, (such five acres to be selected by the said [*lessees*], their executors, administrators, or assigns, at their discretion, and to consist of one entire piece), nor any greater quantity of limestone than two thousand tons weight thereof, over and above the quantity which shall be necessary or proper for the use and consumption, during the continuance of this demise, of the colliery and works to be carried on upon the said premises as aforesaid, or for the purposes thereof, in the usual and regular course of similar mining operations, (and for which two thousand tons of limestone, it is understood that no rent or other compensation shall be rendered or paid), nor any greater quantity of fire-clay, ironstone, and other materials, than shall be necessary or proper for the use and consumption of the said colliery and works, or for the purposes thereof, in the usual and regular course of similar mining operations in the said county of ——; and generally, with full power and authority to do all other necessary and proper acts, matters, and things, for laying dry, raising, getting, and working the said mines, depths, and veins of coal, and disposing of the produce thereof, and for raising, digging, getting, and disposing of the several other minerals and substances aforesaid, (subject as aforesaid), and for deriving the full benefit of the demise hereby made, and the powers and privileges hereinbefore granted, according to the true intent and meaning thereof, as to them the said [*lessees*], their executors, administrators, and assigns, shall seem expedi-

And dig and burn limestone for sale.

Limitation as to quantity of brick-clay and limestone to be raised for sale.

rood, or thereabouts, be the same more or less; and the same are now or were late in the several occupations of [*tenants*], and are severally numbered and called or known by the several names, and contain the several quantities mentioned and delineated in the map or plan thereof hereunder written; and which said map or plan, with the several references thereunto, is and are to be considered as part of these presents: Together also with full and free liberty, power, and authority to and for the said [*lessees*], their executors, administrators, and assigns, and their miners, agents, workmen, and servants, to enter upon the said lands and premises, or any part thereof, and to occu-

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

Reference to plan.

Liberty to enter upon and occupy lands.

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ent, (excepting and always reserving out of this present demise, unto the said [*lessor*], his heirs and assigns, all timber-trees and other trees* now standing or growing upon the said lands hereby demised, or any part thereof, or which shall be standing or growing thereon at any time during the continuance of this demise; *And also*, full and free liberty and authority of ingress, egress, and regress, for the said [*lessor*], his heirs and assigns, and his and their servants, agents, and workmen, with or without horses, waggons, carts, and carriages, at all reasonable times in the year, to enter and come into and upon the said lands hereby demised, to fell, cut down, grub up, square, saw, cord, load, and carry away the same, and for that purpose to make saw-pits, dig sand, and plant or set any kind or sort of young trees in the room of any trees that shall be blown down or decayed, or which shall be cut down by the said [*lessees*], their executors, administrators, and assigns, in pursuance of the power for that purpose hereinafter contained, and to set up and erect proper guard mounds to preserve the same, not being in the hedge or hedge-rows of and belonging to the said demised premises, other than such thorns as shall be necessary for the repair of the fences."

Exception of trees.

With liberty of ingress, &c. for the purpose of cutting timber, &c.

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* An exception of "timber and other trees, woods, underwoods," &c., has been held not to include the soil on which the trees grow; *Legh* v. *Heald*, 1 Barn. & Adolph. 622; though, by an exception of all woods and underwoods, &c., the soil itself is excepted. *Whistler* v. *Paslow*, Cro. Jac. 487.

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

py so much and such parts thereof as may be necessary for the carrying on the works of the said mines, they the said [*lessees*], their executors, administrators, and assigns

Giving notice to tenants;

first giving one calendar month's notice in writing to the respective tenants or occupiers of the said lands and premises, or leaving the same for them, at his, her, or their respective usual places of abode, and specifying, in every such notice, the names and particulars of the fields or field and quantity of land intended to be entered upon and taken possession of by them the said [*lessees*], their executors, administrators, and assigns; and they the said [*lessees*], their executors, administrators, and assigns, also

and making compensation.

making reasonable compensation to the respective tenants or occupiers for the time being of the said lands and premises so entered upon and taken possession of by them as aforesaid, for all injury and damage to be done to the said land, and to the corn and other crops then standing or growing thereupon; such compensation, in case the said parties cannot agree respecting the same, to be determined by arbitration, pursuant to the clause hereinafter contained; also the like full and free liberty, power, and authority

Also to open pits, &c.

to and for the said [*lessees*], their executors, administrators, and assigns, to open, sink, dig, drive, work, and make any pits, shafts, adits, canals, water-courses, fences, soughs, tunnels, drains, ways, paths, roads, passages, and rail-ways, in and upon the said lands and hereditaments, or in or under any part thereof, but not to sink any pit or pits in or upon the gardens now in the respective occupations of

And to win and carry away coal, and get brick-clay:

—— and ——, and to win, get, work, raise up, stack, carry away, sell, and dispose of all that the said mine of ten yard coal, and to get the said common brick-clay, and to convert the same into bricks, tiles, or quarries, and to make coke upon the said lands or any part thereof, and to build,

To set up engines, &c.

erect, set up, and maintain all such engines, gins, whimseys, machinery, house, kilns, sheds, huts, and other erections whatsoever upon the said lands and hereditaments, as may be deemed necessary or expedient for the more effectually working, consuming, and disposing of the said coal, and getting and converting the said common brick-clay, and the making of coke, and generally to do and perform all such other acts as may be necessary to be done and performed for the purpose of laying, placing, stacking, stowing, and

exposing to view, selling, consuming, and disposing of and carrying away all such thick or main coal, and slack, and the coke to be made upon the said hereditaments, and for the making and converting into bricks, tiles, or quarries, the said common brick-clay, to the greatest advantage; except nevertheless and reserved out of the demise and grant hereby made, unto the said [*lessor*], his heirs and assigns, during the continuance of the said term, all such other seams, strata, veins, and mines of coal as are situate and lying either above or beneath the said mine or stratum of ten yard coal, and all and all manner of iron-stone, pot and pipe-clay, fire-clay, stone, and all other mines and minerals of what nature or kind soever the same may be; and also full and free liberty for the said [*lessor*], his heirs or assigns, and his and their respective workmen, agents, and labourers, to have and enjoy free ingress, egress, and regress, for the purpose of using, occupying, and enjoying the said excepted mines and premises, and for the purpose of working, digging, breaking up, getting, carrying away, converting, and selling the said excepted coal, iron-stone, mines, minerals, clay, and stone, at his or their will and pleasure, and, for the purposes last aforesaid, to make use of and deepen all or any of the pits or shafts which have already been made by the said [*lessor*], or which shall or may hereafter be made or sunk by the said [*lessees*], their executors, administrators, or assigns, on any of the said lands and premises, when they the said [*lessees*], their executors, administrators, or assigns, shall have worked out such pits, and have discontinued using such shafts; and to erect, build, and construct all such erections, buildings, furnaces, kiln-works, machinery, and conveniences, as he or they may think necessary for all or any of the purposes aforesaid; But nevertheless so as that the said [*lessor*], his heirs or assigns, in the getting and working of the said excepted mines, or in the use or enjoyment of any of the powers hereby reserved, do not obstruct, hinder, or prevent the said [*lessees*], their executors, administrators, or assigns, from getting, converting, and disposing of the mines hereby demised to the best advantage, and so as that the said [*lessor*], his heirs, or assigns, do make such reasonable compensation to the said [*lessees*], their executors, administra-

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

Exceptions and reservations:

All other mines of the lessor above or beneath the demised mines;

with power of entry to work the excepted mines.

To make use of shafts disused by lessees.

Powers reserved to the lessor not to interfere with the working of the mines demised.

And compensation to be made for any damage

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

tors, or assigns, for all such damage or interruption as shall be occasioned to them, in the enjoyment of the said hereby demised mines and premises, by reason or in consequence of the said excepted liberties, powers, privileges, and authorities, and also for the coal that shall be left by them the said [*lessees*], their executors, administrators, and assigns, for the necessary support and preservation of the shafts for the use of the said [*lessor*], his heirs, or assigns; and also making an abatement in the surface rent hereinafter reserved, for so much of the said land for the time being in the occupation and possession of the said [*lessees*], their executors, administrators, or assigns, as shall be so used by the said [*lessor*], his heirs, or assigns, for the purpose aforesaid; the amount of such compensation, in case of the disagreement of the said parties respecting the same, to be settled and ascertained by reference to arbitration, in pursuance of the clause hereinafter for that purpose contained; TO HAVE, HOLD, USE, OCCUPY, AND ENJOY (*c*), the said mine of ten yard coal, and the said mine, vein, or bed of common brick-clay, and all and singular the privileges, liberties, powers, and authori-

or interruption to lessees.

Habendum as to mine.

Variation.

(*c*) If the lands are demised, the terms of the *habendum* will be—

Habendum as to lands and mines;

"TO HAVE AND TO HOLD, use, exercise, and enjoy the said messuage or tenement, buildings, pieces or parcels of land, hereditaments, mines, minerals, powers, liberties, privileges, and other the premises hereby demised or intended so to be, with their appurtenances, unto the said [*lessees*], their executors, administrators, and assigns, for and during and unto the full end and term of —— years, to be computed from the —— day of ——; AND TO HAVE AND TO HOLD, take, and dispose of all the coals and other minerals and produce, to be raised and gotten by the said [*lessees*], their executors, administrators, or assigns, during the said term, by virtue and in pursuance of these presents, unto the said [*lessees*], their executors, administrators, and assigns, to and for their own absolute use and benefit, (subject to the stipulations, covenants, and agreements herein contained, for regulating the use, employment, and disposition of such coals, minerals, and produce)."

To lessees, (as joint tenants).

Habendum as to coals, &c.

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

ties, and other the premises hereby respectively demised, unto the said [*lessees*], their executors, administrators, and assigns, as tenants in common, and not as joint tenants, from the twenty-fifth day of March, in this present year ——, for and during and unto the full end and term of thirty years thence next ensuing, and fully to be complete and ended: And To HAVE AND TO HOLD, USE, TAKE, AND ENJOY all and singular the coal and common brick-clay, (except as before excepted), that shall be found, had, or gotten, within the said term, from and out of the said mine of ten yard coal and the said mine of clay, hereby respectively demised unto the said [*lessees*], their executors, administrators, and assigns, to and for their own proper use and benefit, as tenants in common and not as joint tenants; YIELDING AND PAYING therefore during the said term, unto the said [*lessor*], his heirs, and assigns, for every acre of the surface of the land hereinbefore mentioned of the said [*lessor*], that shall from time to time be entered upon and used and occupied by the said [*lessees*], their executors, administrators, and assigns, for the purpose of working and getting the said mine of ten yard coal and common brick-clay, or for any of the purposes hereinbefore mentioned, the yearly rent of 4*l.* 10*s.* of lawful money of Great Britain, and so in proportion for a less quantity than an acre (*d*), by four equal quarterly payments in each and every year, (that is to say), on the twenty-fourth day of June, the twenty-ninth day

To lessees as tenants in common.

Habendum as to coal to be raised,

To lessees as tenants in common.

Reservation of surface rent, according to the quantity of the land occupied.

(*d*) If the lands are demised, the *reddendum* will be as follows:—

Reddendum where a specific portion of land is demised.

"YIELDING AND PAYING therefore yearly and every year during the said term of —— years hereby granted, unto the said [*lessor*], his heirs and assigns, the yearly rent or sum of £——, of lawful British money, as and for the surface rent of the said messuage or tenement, buildings, and pieces or parcels of land or ground hereby demised, clear of all taxes, charges, and assessments whatsoever, now or hereafter to be charged or assessed on the same premises, or the erections and buildings to be erected and built thereupon, whether the said taxes or assessments, or any

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

of September, the twenty-fifth day of December, and the twenty-fifth day of March, without any deduction or abatement whatsoever for taxes or otherwise, (except the land-tax), the first payment thereof to be made on the first of the said quarterly days of payment which shall happen next after the said lands shall be so entered upon and occupied by the said [*lessees*], their executors, administrators, and assigns, as aforesaid (*e*); and the said rent to continue payable during all the then residue of the said term, whether the said lands shall continue to be used by them or not, subject nevertheless as hereinafter mentioned; and the quantity of the said land for the time being in the occupation of the said

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of them, be of the nature of those now in being or not, the land-tax only excepted, by four equal quarterly payments, &c. *(Reservation of additional rent for ploughing pasture, &c. ut ante,* Vol. 4, p. 468).

The variations introduced into the notes of this precedent will be found to be, though not always exclusively, applicable to the case of a demise of a specific quantity of lands with the mines under the same, and not merely of the mine with rights of entry upon the land, as in the precedent in the text.

(*e*) Sometimes the reservation is in these terms:

Reservation of —*s. per* square yard for surface rent, during occupation.

"YIELDING AND PAYING, &c. on each of the four quarterly days of payment hereinbefore mentioned, for and during such time or times during the said term as any of the said lands hereinbefore described or referred to shall, in the quarter of a year ending on the current quarterly day of payment for the time being, be occupied, enjoyed, or used by the said [*lessees*], their executors, administrators, or assigns, or their agents, workmen, or servants, in pursuance of any of the liberties, powers, and authorities hereinbefore granted, for or in respect of the occupation, enjoyment, or use of such lands, a further rent or sum of —— shillings, for every square yard of land which shall be so occupied, enjoyed, or used."

Where the rent of any part of the land is to cease when it is no longer wanted, some provision as to giving it up in this event should be inserted. —*Vide post.*

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

[*lessees*], their executors, administrators, or assigns, to be ascertained, in case of the disagreement of the said parties respecting the same, by reference to arbitration, in pursuance of the clause hereinafter for that purpose contained; *And also* YIELDING AND PAYING unto the said [*lessor*], his heirs and assigns, during the said term, the following rents or royalties, (that is to say), so long as and whenever, during the said term, the regular market price of large or best coal shall not exceed the sum of 9*s. per* ton, then the royalty or rent to be paid in respect of such large or best coal shall be 2*s.* 3*d.* for every ton weight of such large or best coal, to be won, raised, or gotten from and out of the said mine, and so in proportion for any less quantity than a ton, each ton weight to consist of twenty-one hundred weight, and each hundred weight to consist of one hundred and twenty pounds; and so long as and whenever, during the said term, the regular market price of lumps or round coal shall not exceed the sum of 4*s.* 6*d. per* ton, the rent or royalty to be paid in respect of such lumps or round coal, to be won, raised, or gotten from and out of the said mine, shall be 1*s.* for every ton weight of such lumps or round coal, and so in proportion for any less quantity than a ton, each ton weight to be of the contents aforesaid; and so long as and whenever, during the said term, the regular market price of coke shall not exceed the sum of 1*s.* 6*d. per* sack, the rent or royalty to be paid in respect of such coke as shall be made upon the said above-mentioned lands and premises, shall be 3*d.* for every sack, and so in proportion for any less quantity than a sack. But whenever and so often as it shall happen during the said term, that the regular market price of large or best coal shall exceed the sum of 9*s. per* ton, then the rent or royalty to be paid in respect of every ton of such large or best coal, shall be the sum of 2*s.* 3*d.* together with one third part of the sum such large or best coal shall sell for by the ton, for the time being, above the sum of 9*s. per* ton, and so in proportion for any less quantity than a ton: And whenever and so often as it shall happen during the said term, that the regular market price of lumps or round coal shall exceed the sum of 4*s.* 6*d. per* ton, then the rent or royalty to be paid in respect of every

Reddendum.

Royalties varying according to market price.

For large or best coal 2*s.* 3*d. per* ton when market price does not exceed 9*s.*

Contents of each ton.

For lumps or round coal 1*s. per* ton when market price does not exceed 4*s.* 6*d.*

For coke 3*d. per* sack when market price does not exceed 1*s.* 6*d.*

When market price is above the specified prices;

Royalty of one third on such excess.

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

ton of lumps or round coal so to be raised or gotten from and out of the said mine, shall be the sum of 1*s.*, together with one third part of the sum which such lumps or round coal shall sell for by the ton, for the time being, above the said sum of 4*s.* 6*d. per* ton, and so in proportion for any less quantity than a ton; and whenever and so often as it shall happen during the said term, that the regular market price of coke shall exceed the sum of 1*s.* 6*d. per* sack, then the rent or royalty to be paid in respect of every sack of coke made upon the said hereditaments, shall be the said sum of 3*d. per* sack, together with one sixth part of the sum which such coke shall sell for by the sack, for the time being, beyond the said sum of 1*s.* 6*d. per* sack, and so in proportion for a less quantity than a sack (*f*); *And also* YIELDING AND PAYING unto the

Royalty of one penny *per* ton for slack.

(*f*) The modes of reserving royalties in mining leases are various: sometimes a certain portion of the produce of the mine is to be delivered or laid out by the lessee to or for the lessor, which is a frequent mode of reservation in leases of tin and copper mines; in other cases, a proportion of the monies arising from the gross produce is reserved to the lessor. In the latter case, the terms of the reservation are as follow:—

Reddendum of a portion of the monies arising from the produce;

"*Also* YIELDING AND PAYING unto the said [*lessor*], his heirs and assigns, as and for the royalty or mine rent, during the said term, one sixth part of the amount of the gross monies, (whether in fact such monies shall be received or not), for which all coals to be gotten or obtained during the said term from the mines or veins of coal hereby demised, shall be sold or contracted to be sold at the mouth of the pit or shaft, or elsewhere*, (exclusively of coal used for the burning of bricks, lime, or other materials, for the use of such works or erections, to be made on the premises, and for working the engines and whimseys on the said premises for draining the water out of the mines and raising

Except coal used in the mines;

* See *Clifton* v. *Walmesley*, 5 D. & E. 564, where, under a covenant to pay a proportion of what the coals should sell for at the pit's mouth, it was held, that an action could not be maintained for coals sold elsewhere.

said [*lessor*], his heirs and assigns, the further rent or

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

the coals out of the pits or shafts; and also exclusive of such coal, not exceeding —— tons *per annum*, as shall be consumed upon the said hereby demised premises by the said [*lessees*], their executors, administrators, or assigns, and the agents, colliers, miners, or other workmen, to be employed by them in and about the said works, or in their own respective dwelling-houses, and for their own respective culinary and other domestic purposes, and for which coal so used, not exceeding the said amount of —— tons *per annum*, it is hereby agreed that no royalty or rent shall be paid; and exclusively of coal supplied to the bailiff or agent of the said [*lessor*], his heirs or assigns, pursuant to the covenant hereinafter contained); which said royalty or mine rent, so reserved as aforesaid, shall be paid and payable by four quarterly payments in each and every year of the said term, (that is to say), on the —— day of ——, &c. the first quarterly payment thereof to begin and be made on the —— day of —— now next ensuing, without any deduction or abatement on account of bad or doubtful debts, or of the costs, charges, and expenses of winning or getting the said coal, or of any taxes, assessments, or impositions, or on any other account whatsoever; *And also* YIELDING AND PAYING during the said term, unto the said [*lessor*], his heirs and assigns, the sum of —— shillings of lawful British money, for every quantity of one thousand bricks which shall be made by the said [*lessees*], their executors, administrators, or assigns, by virtue of these presents, over and above the bricks which shall be made and used by them for the purpose of the said colliery and works, and over and above the quantity of one hundred thousand beyond the bricks so used, (it being understood that they shall be at liberty to make and sell for their own benefit one hundred thousand bricks beyond the quantity requisite for the said colliery and works, without paying or rendering any compensation for the same), such rent of —— *per* thousand to be payable quarterly, on the days or times and in manner hereinbefore appointed for payment of the said royalty or mine rent."

Or by the lessees, their workmen, &c. for domestic purposes.

Reddendum of —*s* a thousand for bricks.

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

royalty after mentioned, (that is to say), the sum of 1*d. per* ton for all slack stock that shall be raised and gotten during the said term from and out of the said mine, (except only such part thereof as shall be consumed on the premises in manner hereinafter mentioned), and so in proportion for any less quantity than a ton, each ton to be of the contents aforesaid; and also the sum of 1*s.* 6*d.* for every thousand bricks, tiles, or quarries, to be made from the said common brick-clay hereby demised, except such part of the said bricks and quarries as shall be used and employed in and about the buildings and erections now standing, or hereafter to be erected, on the said premises, or in or about the working and converting of the mine of coal hereby demised, and so in proportion for any less quantity than a thousand. And in case in any quarter of a year during the first year of the said term, to be computed from the twenty-fifth day of March in the present year, the quantity of best or large coals that shall have been actually raised and gotten from and out of the said mine hereby demised, shall not amount to the full quantity or weight of five thousand tons, as stipulated in the covenant hereinafter in that behalf contained, but the quantity which shall have been so actually raised and gotten, within each or any of those quarters of a year, shall have fallen short of the aforesaid stipulated quantity in weight of five thousand tons, then YIELDING AND PAYING unto the said [*lessor*], his heirs and assigns, for and during the said first year of the said term (over and above and in addition to the said mine rents, royalties, or reservations hereinbefore reserved, for and upon or in respect of the quantity of such best or large coal, which shall happen to have been actually raised and gotten in each or any of those quarters of a year), so much and such additional and further sum of money, (exclusive of the said surface rent), as the same mine rents, royalties, or reservations, according to and under the fluctuating reservations in price hereinbefore contained thereof, shall or may, from time to time, amount unto, upon the deficiency or failure between the quantity or weight of such best or large coals, that shall have been actually raised and gotten by the said [*lessees*], and the said specific quantity of five thousand tons stipu-

—1*s.* 6*d. per* thousand for bricks.

If quantity of coals worked in any quarter of first year falls short of five thousand tons;

Reddendum in respect of deficiency during such quarter.

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

lated to be raised and gotten by the said [*lessees*], their executors, administrators, or assigns, as aforesaid, in each or any of those quarters of a year; And in case in any quarter of a year during the second year of the said term, to be computed from the twenty-fifth day of March in the year ——, the quantity or weight of best or large coals that shall have been actually raised and gotten from and out of the said mine hereby demised, shall not amount to the full quantity or weight of six thousand two hundred and fifty tons, as also stipulated in the said covenant hereinafter in that behalf contained, but the quantity or weight which shall have been so actually raised and gotten within each or any of those last-mentioned quarters of a year, shall have fallen short of the last-mentioned stipulated quantity or weight of six thousand two hundred and fifty tons, Then also YIELDING AND PAYING unto the said [*lessor*], his heirs and assigns, during the continuance of the said term, (over and above and in addition to the said mine rents, royalties, or reservations hereinbefore reserved and made payable, for and upon or in respect of the quantity of such best or large coals, which shall happen to have been actually raised and gotten in each or any of such last-mentioned quarters of a year), such further and additional sum of money, (exclusive of the said surface rent), as the same mine rents, royalties, or reservations, (according to and under the fluctuating reservations in price hereinbefore contained thereof), shall or may from time to time amount unto upon the deficiency or failure between the quantity or weight of such large or best coals, that shall have been actually raised and gotten, and the last-mentioned specific quantity of six thousand two hundred and fifty tons, stipulated to be raised and gotten by the said [*lessees*], in each or any of those last-mentioned quarters of a year; And in case in any one quarter of a year, during the residue of the said term hereby granted, to be computed from the twenty-fifth day of March, in the year ——, and until the said mines shall be incapable of producing seven thousand five hundred tons *per* quarter, (such incapacity to be ascertained by arbitration or umpirage, in manner hereinafter mentioned for the determination of disputes between the said parties hereto),

Reddendum for deficient quantity in second year.

Reddendum for deficiency in quantity of coals during the residue of the term.

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

the quantity or weight of best or large coals, that shall have been actually raised and gotten from and out of the said mine hereby demised, shall not amount to the full quantity or weight of seven thousand five hundred tons, as further stipulated in and by the said covenant hereinafter in that behalf contained, but the quantity or weight which shall have been so actually raised and gotten within each or any of those last-mentioned quarters of a year, shall have fallen short of the last-mentioned stipulated quantity or weight of seven thousand five hundred tons, Then further YIELDING AND PAYING unto the said [*lessor*], his heirs and assigns, during the continuance of the said term, over and above and in addition to the mine rents, royalties, or reservations hereinbefore reserved and made payable, for and upon or in respect of the quantity of such best or large coals, which shall happen to have been actually raised and gotten in each or any of those last-mentioned quarters of a year, so much and such further and additional sum of money, (exclusive of the said surface rent), as the same mine rents, royalties, or reservations, (according to and under the fluctuating reservations in price hereinbefore contained thereof), shall or may from time to time amount unto upon the aforesaid deficiency or failure between the quantity or weight of such best or large coals that shall have been actually raised and gotten, and the last-mentioned specific quantity of seven thousand five hundred tons, stipulated to be raised and gotten by the said [*lessees*] in each or any of those last-mentioned quarters of a year; Nevertheless, they the said [*lessees*], their executors, administrators, or assigns, in case of their having made up and paid for any such deficiency or failure in the several and respective quantities of five thousand tons, six thousand two hundred and fifty tons, and seven thousand five hundred tons, in and by these presents stipulated to be raised and gotten in each and every quarter of a year, during the several and respective years or periods hereinbefore in that behalf mentioned, shall be at liberty, from time to time in any succeeding quarter of a year, when and as the quantity or weight which shall be actually raised and gotten in each or any of those succeeding quarters of such year, shall ex-

But deficiency paid for in any quarter may be worked in any succeeding quarter without further payment.

ceed the several and respective specific and stipulated quantities hereinbefore mentioned, to make up and re-imburse themselves such sum or sums of money which shall have been paid for such deficiency or deficiencies in quantity as aforesaid, by selling and disposing of such excess in quantity or quantities of the said best or large coals, as, at the rate of the aforesaid fluctuating rents, royalties, or reservations in price hereinbefore reserved and made payable, shall amount to the sum or sums of money they shall have paid for and upon or in respect of any short or deficient quantity of such best or large coals, in any preceding quarter of a year during the several and respective years or periods hereinbefore mentioned of the said term hereby granted, and without paying or being liable to pay any rent or royalty for such excess of quantity (*g*); AND *it is hereby agreed and declared between and by the said parties hereto*, that all the before-mentioned rents, royalties, and sums of money shall be paid in manner hereinafter provided and agreed upon, by four equal quarterly payments in every year during the said term, (that is to say), on the —— day of July, the —— day of October, the —— day of January, and the —— day of April, without any deduction or abatement whatsoever, and that the first payment thereof shall be made on the —— day of —— now next

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

Times of payment of royalties before reserved.

(*g*) Where the object is simply to reserve an additional rent in respect of any deficiency in the stipulated quantity of coals to be raised, a concise mode of effecting this is as follows—After reserving a royalty of so much a ton, or a certain proportion of the produce payable quarterly—

Reddendum in respect of deficiency of quantity of coals, (by short mode).

"And also every quarter of a year, on each of the four quarterly days of payment hereinbefore mentioned, until the veins or strata of coal hereinbefore demised shall, in the quarter ending on the quarterly day of payment for the time being, be incapable of producing —— tons of coals *per* week, on an average, during such quarter, such further rent or sum of money, as, with the rent, royalty, or sum of money hereinbefore made payable for or in respect of such coals, will amount, in such quarter, to the sum of £——."

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

ensuing. PROVIDED ALWAYS, *and it is hereby agreed and declared between and by the said parties hereto*, that none of the rents, royalties, or reservations hereinbefore reserved in respect of the said hereditaments hereby demised, or intended so to be, (except the said surface rent), shall be payable by the said [*lessees*], their executors, administrators, or assigns, during such period as the working of the said mine shall be suspended or stopped by reason of any fault or failure in the said mine, or by any accident by fire or water, or by any other inevitable accident, the said [*lessees*], their executors, administrators, or assigns, during such suspension or suspensions, stoppage or stoppages, using their utmost endeavours to remove and remedy such hinderance or cause of suspension or stoppage; and that any disagreement arising between the said parties, as to what shall be deemed such fault or failure as aforesaid, or otherwise respecting any stoppage or suspension of the said mine, shall be referred to arbitration in manner hereinafter mentioned; *Provided further*, that, in case a partial stoppage or suspension only shall happen by reason of any such fault, failure, or inevitable accident, Then the said [*lessees*], their executors, administrators, or assigns, shall work such pits or shafts, to which such fault or failure, accident, suspension, or stoppage shall not extend, and shall pay the said several rents, royalties, and sums of money hereinbefore reserved, only in proportion to the extent of the works of the said mines and colliery to which such fault or failure, accident, and consequent suspension or stoppage shall not extend; such proportion (in case of the disagreement of the said parties respecting the same,) to be ascertained by reference to arbitration, in pursuance of the clause for that purpose hereinafter contained; PROVIDED ALSO, that, if any such accident or accidents by fire, water, or otherwise, or any such suspension or stoppage shall arise or be occasioned by any improper act, neglect, or wilful default of the said [*lessees*], their executors, administrators, or assigns, or their agents, servants, or workmen, then, and in every such case, the whole of the said rents, royalties, and sums of money, shall continue to be paid by the said [*lessees*], their executors, administrators, or assigns, in the

Royalty to cease during the suspension of the works by accident, &c.

In case of partial failure, &c. proportional rent to be payable.

If suspension happen by default of lessees whole rent to be payable.

same manner as the same rents, royalties, and sums of money would have been payable in case such suspension or stoppage had not taken place; PROVIDED ALSO, *and it is hereby agreed and declared between and by the said parties hereto*, that, in case at any time during the continuance of the said term of thirty years hereby granted, the said mine of ten yard coal hereby demised shall fail or be completely and effectually worked out and exhausted, or shall become utterly incapable of being further worked, by reason of some inevitable accident, not happening by neglect or unskilfulness, (the fact of such failure and exhaustion, and of such inevitable accident, to be ascertained by reference to arbitration, in manner hereinafter mentioned, in case the said parties hereto shall happen to disagree respecting the same), and the said [*lessees*], their executors, administrators, or assigns, shall be desirous of quitting and giving up the possession of the said mines and hereditaments hereby demised, on any of the said quarterly days or times hereinbefore appointed for payment of the said rents or royalties, and of such their desire shall give notice in writing to the said [*lessor*], his heirs or assigns, six calendar months next immediately preceding any such quarterly day, then, and in such case, upon full payment of all arrears of the said surface and other rents, royalties, and sums of money hereinbefore reserved and made payable, and performance of all the provisoes, covenants, and agreements herein contained on the part of the said [*lessees*], their executors, administrators, or assigns to be performed, in relation to the mode of quitting the said lands, mines, and hereditaments on the regular expiration of the term hereby granted, this lease, and every covenant, clause, matter, or thing herein contained, shall on such quarterly day determine and be utterly void to all intents and purposes, in like manner as if the said term of thirty years had expired by effluxion of time, any thing herein contained to the contrary thereof notwithstanding. PROVIDED ALSO, *and it is hereby further agreed and declared between and by the said several parties hereto*, that the quantity of best or large coals to be raised and gotten from and out of the said mine hereby demised, shall be as after mentioned, (that is to say), in

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

Proviso for avoiding the lease at the election of the lessees, in case of accident to the mine, or in case of its being worked out.

Agreement as to quantities to be gotten in each quarter.

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

each and every quarter of the first year of the said term hereby granted, (to be computed from the time hereinbefore in that behalf mentioned), there shall be raised and gotten from and out of the said mine not less than five thousand tons in weight of the said large or best coals; and in each and every quarter of the second year of the said term, to be computed from the day and time hereinbefore in that behalf also mentioned, there shall be raised and gotten from and out of the said mine not less than six thousand two hundred and fifty tons in weight of the said large or best coals; and after the expiration of the said first and second years of the said term, and during the residue of the same term, to be computed from the day and time hereinbefore in that behalf also mentioned, and until the said mines shall be incapable of producing seven thousand five hundred tons *per* quarter, there shall be raised and gotten from and out of the said mine, in each and every quarter of every succeeding year of the said term, not less than the last-mentioned quantity of seven thousand five hundred tons in weight of such large or best coals; and that the several and respective fluctuating royalties hereinbefore reserved shall be paid and payable by the said [*lessees*], their executors, administrators, and assigns, upon each and every of those specific quarterly quantities of coal, in each and every quarter during the several years above mentioned, notwithstanding a less quantity may happen to be gotten and raised within any such quarter, unless they the said [*lessees*], their executors, administrators, and assigns, shall be actually prevented from raising those several specific quarterly quantities by reason of any fault or failure in the said mine, or by any accident by fire or water, or by any other inevitable accident, as mentioned in the proviso hereinbefore in that behalf contained (*h*). PROVIDED ALSO, *and it is hereby further agreed and declared between and by the said several parties hereto,* that the quantity or weight of lumps or round coals to

Proportion of different species of coal to be gotten.

(*h*) As there is a subsequent covenant to work the mines according to the reservations, the necessity of this clause is not very apparent. The same observation applies to the next clause.

be gotten and raised from and out of the said mines in each and every quarter, shall not exceed one fifth part or share of the whole quantity of coals to be raised from and out of the said mine in such quarter, (exclusive of slack), and that if the quantity or weight of lumps or round coals so to be gotten and raised from and out of the said mine in each and every such quarter, shall exceed the proportion of one fifth part or share of the whole quantity of coals which shall be raised from and out of the said mine in any one such quarter of a year, (exclusive of slack), then, and in every such case, every such excessive quantity of lumps or round coals so to be gotten and raised as aforesaid, over and above the proportion or quantity of one fifth part or share of the whole coals to be gotten and raised in any one such quarter of a year as last mentioned, shall be reckoned and charged to and paid for by the said [*lessees*], their executors, administrators, or assigns, as and for large or best coals, at, under, and according to the fluctuating royalty in price hereinbefore reserved for the time being in respect of such large or best coals; the proportion of the said several quantities of large or best coals to be gotten from and out of the said mine to be ascertained (in case of the disagreement of the parties respecting the same,) by reference to arbitration in manner hereinafter mentioned. PROVIDED FURTHER, *and it is hereby also agreed and declared between and by the said several parties hereto*, that the quantity and weight of the coals to be raised, won, and gotten from time to time from and out of the said mine of ten yard coal hereby demised, shall be ascertained in manner following, (that is to say), the quantity and weight of such part thereof as shall be carried away from the said hereditaments by means of boats, shall be ascertained by a proper and accurate gauge of the boats in which such coal shall be so carried away, and the quantity and weight of such part thereof as shall be carried away and disposed of by land carriage, shall be ascertained by means of a proper and accurate weighing machine or machines to be forthwith erected for that purpose, as hereinafter provided. PROVIDED ALSO, *and it is hereby agreed and declared between and by the said several parties hereto*, that no such rents, royalties, reserva-

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

Mode of ascertaining the quantities raised.

No rent to be payable for slack used on the premises,

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

tions, sum or sums of money, as are hereinbefore reserved and made payable as aforesaid, shall be payable by the said [*lessees*], their executors, administrators, and assigns, for or on account of any slack to be used or consumed by means of the fire engines or steam engines, erected or hereafter to be erected on the said demised premises, solely for the purpose of working and draining or drawing water or coal from and out of the said mine or colliery; or for or on account of any coals consumed by the labourers or workmen to be employed by the said [*lessees*], their executors, administrators, or assigns, or by any one agent or cheque clerk to be employed by them in or about the said mine, works, and premises, and as are usually allowed to them for domestic purposes, but not for any other purpose; nor for or in respect of any slack or coal that shall or may be used and consumed for the burning and making of bricks, tiles, or quarries, so to be used and employed in any of the pits, shafts, works, drains, soughs, tunnels, and walls, for keeping out or preventing the communications of damps or fire within any of the said pits now sunk or hereafter to be sunk upon the said premises, nor in respect of any bricks, tiles, or quarries to be used and employed in the building or erection, or in the reparation from time to time of any furnaces, engines, wharfs, quays, warehouses, bridges, houses, erections, or buildings of what nature or kind soever, within, under, or upon the said lands, grounds, mines, and hereditaments, or in anywise in the works of the said mines and colliery, during the continuance of the said term. PROVIDED ALSO, *and it is hereby further agreed and declared between and by the said parties hereto*, that, if they the said [*lessees*], their executors, administrators, or assigns, shall at any time during the continuance of the said term hereby granted, convert into coke any of the large or best coals which shall be got and raised from the said mines hereby demised, then, and in every such case, they the said [*lessees*], their executors, administrators, or assigns, shall and will pay the royalty hereinbefore reserved upon such best or large coals so to be converted into coke as aforesaid, and not the royalty hereinbefore reserved and made payable for or in respect of coke. PROVIDED ALSO, *and it is hereby further agreed and declared between*

or consumed by the workmen or agent employed,

or in the making of bricks to be used in the works.

Royalty to be payable upon best coals made into coke.

Liberty to lessor to appoint agents to reside on the premises.

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

and by the said parties hereto, that it shall be lawful for the said [*lessor*], his heirs and assigns, to appoint, employ, and keep at their, his, or her own expense, one or more agent or agents, cheque clerk or cheque clerks, inspector or inspectors, viewer or viewers, steward or stewards, or bailiff or bailiffs, to attend and reside constantly or occasionally, as he or they shall think fit, upon, in, or near to the said colliery and works; and also by himself, herself, or themselves, or such agent, clerk, viewer, inspector, steward, or bailiff, or any other person or persons whom he or they shall appoint, from time to time during the said term hereby granted, into and upon the said hereditaments hereby demised to enter, and to view the state and condition of the buildings, erections, engines, shafts, pits, works, colliery, hereditaments, and premises, and the manner in which the same works are carried on, without any hinderance or interruption, but on the contrary with the help and assistance of the said [*lessees*], their executors, administrators, or assigns, their agents, workmen, servants, and labourers, and the use of their machinery, implements, and utensils; AND further, that the said [*lessees*], their executors, administrators, or assigns, shall and may use and occupy all and every the pits and shafts already made and sunk upon the said hereditaments, for the purpose of getting and raising the said mine of ten yard coal hereby demised, without making any compensation for the said shafts and pits. PROVIDED ALSO, *and it is hereby agreed and declared between and by the said several parties hereto*, that it shall be lawful for the said [*lessor*], his heirs, and assigns, to enter into and upon the said hereditaments, mine, and premises, with all necessary agents, workmen, and miners, for the purpose of working, getting, raising, and carrying away, selling and disposing of the said hereinbefore excepted mines and premises, and to work, dig, break up, get, carry away, convert, sell, and dispose of all the said excepted mines of coal and ironstone, and other mines, minerals, and clay, at his, their, or any of their will and pleasure; and for those purposes to make use of and deepen all or any of the pits or shafts which are now made or sunk, or may hereafter be made or sunk by them the said [*lessees*], their executors, administrators, or assigns, or any part or parts of the said

Lessees may use old shafts without compensation.

Liberty to lessor to work the excepted mines;

And to use shafts which have been disused by the lessees.

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

hereby demised hereditaments, when and as soon as they the said [*lessees*], their executors, administrators, or assigns, shall have worked out such pits, and discontinued using such shafts; and to erect, build, and construct all such furniture, kilns, works, machinery, and other erections and conveniences, as he or they shall think necessary for any of the purposes aforesaid; but nevertheless, so that the said [*lessor*], his heirs, or assigns, entering upon the said excepted mines and premises, shall make and allow from time to time a fair and reasonable abatement in the said surface rent hereby reserved, for so much of the said lands and hereditaments as shall be so taken and used for any of the purposes aforesaid, and shall also make and allow a fair and reasonable compensation to the said [*lessees*], their executors, administrators, or assigns, for all such loss, damage, hinderance, or interruption as shall happen or be occasioned to them in the enjoyment and possession of the said hereby demised lands, mine, and premises, by reason of the exercise or use of all or any of the said excepted liberties, privileges, and authorities, and also for the coal that may be left by the said [*lessees*], their executors, administrators, or assigns, for the necessary support and preservation of the pits for the use of the said [*lessor*], his heirs, or assigns; such abatement and compensation to be ascertained by the said parties hereto, or, in case of their disagreement respecting the same, by reference to arbitration, in pursuance of the clause hereinafter to that effect contained. PROVIDED ALSO, *and it is hereby further agreed and declared between and by the said parties hereto*, that it shall be lawful for the said [*lessees*], their executors, administrators, or assigns, at the expiration or other sooner determination of the said term hereby granted, to remove, carry away, and dispose of all the engines, machinery, implements, articles, and things whatsoever, used or employed in or about the works of the said mine and premises, (except the brick-work, and the roofs erected and built for the security of the said engines and machinery, and the timbers necessary to support the said roofs) (*i*), unless the said [*lessor*], his heirs or

Making an abatement in surface rent, for land used by him [*lessor*].

Lessees may carry away engines at the end of term,

Unless lessor shall be desirous of purchasing same.

(*i*) The principal question arising on the construction of clauses en-

assigns, shall be desirous of purchasing the said engines, machinery, implements, articles, and things, or any part thereof, such desire being signified to the said [*lessees*], their

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

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titling the lessee to remove fixtures, or to be paid for crops, &c., at the end of the term, has been, whether such clauses apply to the determination of the lease by any means, or are confined to the event of its expiration by effluxion of time, or in any other particular manner.

What a determination of a lease for certain purposes.

In *Ex parte Nixon*, 1 Rose, 446; *S. C.* cit. 2 Madd. 319, the question was, whether, under a covenant to leave all the hay, &c., on the demised premises, at "the end or sooner determination of the term," the bankruptcy of the lessee, and the refusal of his assignees to take the lease, was to be considered a "determination" of the lease within the meaning of this covenant; and the Court of King's Bench certified, on a case from Chancery, that it was.

Bankruptcy and rejection of lease by assignees, held to be such.

In *Rex* v. *Topping*, 1 M'Clel. & Younge, 544, in a lease of lands, with power to work mines, &c., for thirty-two years, subject to an earlier determination, the lessees covenanted to repair the said lands, *engines*, (though engines were not mentioned before), &c., and the same, at the end or sooner determination of the term, to yield up; and to erect proper engines for working the mines. The lease also contained a proviso for re-entry on breach of covenant, and on certain specified acts or default by the lessees, and, among others, in case the lease should be extended or taken in execution. This was followed by a clause authorizing the lessees to erect certain engines for draining the mine, and at any time during the term, or within twelve months after the expiration or sooner determination thereof, to take down, remove, and dispose of the same; "*except as in the cases and events thereinbefore mentioned*," unless the lessor should be desirous of purchasing the same; and further authorizing them, at the end of the term, or sooner, if they should so please, *except as in the cases aforesaid*, to take down, remove, carry away, and convert to their own use, all such engines, &c., as had theretofore been erected, and also all such engines, &c., as should be by them erected. The lease gave a power to the lessees to determine the lease at a certain period, but provided that the engines and works should, in that event, become the property of the lessor. An extent issued against the lessees, and one of the questions was, whether this was "a taking in execution" so as to determine the lessee's interest, which was decided in the affirmative. Another point raised was, whether the Crown, as representing the lessees, was entitled to remove certain engines which they had, on entering, purchased of the former occupiers, and others which they had erected. And the Court held, that, in the event which had happened, being one of the excepted cases referred to in the covenants, the lessees were not, and *è consequentiâ* the Crown

Whether lessees entitled to remove machinery, on the determination of the lease, by the issuing of an extent.

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

executors, administrators, or assigns, at least three calendar months before the expiration or other sooner determination of the said term, by some writing under the hand or respective hands of the said [*lessor*], his heirs or assigns, unless the said term shall become suddenly determinable by the act or default of the said [*lessees*], their executors, administrators, or assigns, so as to render such previous notice impracticable; in which case the said [*lessor*], his heirs, or

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was not entitled to remove *any* of the fixtures, whether purchased or erected by them, but the whole belonged to the lessor.

Effect where the previous valuation of the fixtures to be purchased by the lessor is rendered impossible by the act of the tenant.

In a late case, a colliery, with all the machinery and implements necessary for working it, comprised in an inventory and valuation referred to in the lease, was leased for a term of years, with a proviso for re-entry on non-payment of rent, and a covenant on the part of the lessee, at the expiration or *other sooner determination* of the demise, to deliver up the machinery and implements; and that a valuation should be made thereof three months previously, and the difference between that and the valuation then made should be paid by the tenant if the second valuation were less, and by the landlord if it were more, than the valuation made at the commencement of the lease; the landlord obtained a judgment in ejectment, in Trinity term, by reason of a forfeiture for non-payment of the rent, but did not execute the writ of possession until the 8th of November, and the tenant committed an act of bankruptcy on the 9th of November. It was held, *first*, that the landlord was entitled to take possession of all the machinery and implements, (some of which had been erected by the tenant during the term), he accounting for the excess of value above the former valuation, though no previous valuation had been made, the Court being of opinion that the provision for the three months' previous valuation, (which the lessee had, by his own act, rendered impossible to be made), applied to the expiration of the lease, and not to its determination in this manner. *Secondly*, that the possession of the machinery and implements by the tenant was only qualified, and did not come within the meaning of 21 Jac. 1, c. 19, so as to bar the landlord's right of re-entry on the 8th November: and *thirdly*, that the tenant's use of the machinery and implements in the interval between the judgment in ejectment, and the execution of the writ of possession, did not give him the "possession, order, or disposition" thereof, with the consent of the true owner, within the meaning of the statute, so as to pass the property to his assignees. *Stoer* v. *Hunter*, 5 D. & R. 240; *S. C.* 3 B. & C. 368.

The preceding cases will suggest some of the obscurities to be avoided in framing clauses of this nature.

assigns, shall be at liberty to purchase the said engines, machinery, articles, and things, on giving one week's notice or intimation thereof, within fourteen days after his or their entry on the said demised premises; and in either of the said cases the price or sum to be paid for such engines, machinery, articles, and things, or for such part thereof as shall be so intended to be purchased by the said [*lessor*], his heirs or assigns, to be settled and ascertained by him or them and the said [*lessees*], their executors, administrators, or assigns, or, in case of their disagreement respecting the same, by reference to arbitration, in pursuance of the clause for that purpose hereinafter contained (*k*); PROVIDED ALSO

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

(*k*) Sometimes a power is given to the lessee to enter, for the purpose of removing the machinery within a prescribed period after the expiration of the term.

"*And also* that it shall be lawful for the said [*lessees*], their executors, administrators, or assigns, at their own costs and charges, within —— calendar months next after the expiration or other sooner determination of the said term hereby granted, (the said royalty or mine rent, and other the rents, renders, payments, and reservations aforesaid being duly paid and satisfied, and the said several covenants, conditions, and agreements hereinbefore contained, and which, on the part of the said [*lessees*], their executors, administrators, and assigns, ought to have been observed and performed, being duly observed and performed accordingly), to enter into or upon the said hereby demised premises, or any part thereof, with or without horses, carts, carriages, agents, servants, and workmen, and to take down, unfix, and remove all such erections, buildings, and constructions, engines, machines, iron-work, fixtures, fastenings, and conveniences, as shall at any time or times during the said term hereby granted have been erected upon or affixed to the said demised premises, or any part or parts thereof, for the purpose of mining and getting the said mines and veins of coal, and carrying on the other mining operations aforesaid, and not for the purposes of agriculture or husbandry, and to carry away, and convert to their own proper use and benefit, the same erections, buildings, constructions, engines,

Lessees to be at liberty to enter after the end of term for the purpose of removing machinery, &c.

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

and it is hereby further agreed and declared between and by the said parties hereto, that it shall be lawful for the said [*lessees*], their executors, administrators, or assigns, at any time or times hereafter during the continuance of the term hereby granted, upon giving twenty-one days' notice in writing, under their or some of their hands, unto the said [*lessor*], his heirs and assigns, to fell and cut down such timber or timber-like trees, now growing, or at any time hereafter to grow upon the said lands and hereditaments hereinbefore mentioned, as shall be deemed obstructions and necessary to be felled and cut down for the more conveniently working of the said mine and colliery, and getting and converting the said common brick-clay hereby demised; such timber and timber-like trees, when felled and cut down, to be at the sole and absolute disposal of the said [*lessor*], his heirs and assigns; *And further*, that if any dispute shall arise respecting what trees it may be necessary to fell and cut down for the purpose aforesaid, such dispute shall be decided by reference to arbitration, in pursuance of the clause hereinafter for that purpose contained. PROVIDED ALSO, *and it is hereby further agreed and declared between and by the said parties hereto,* that they the said [*lessees*], their executors, administrators, and assigns, in working and getting the said mine hereby demised, shall not nor will do any wilful damage or injury to any of the messuages and other buildings, now stand-

Lessees to be at liberty to cut timber which shall obstruct the working of the mines, on giving notice.

Same when felled to be at the disposal of the lessor.

Proviso that lessees will repair damages done to buildings.

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machines, iron-work, fixtures, fastenings, and conveniences, and the materials thereof, doing as little damage or injury to the said hereby demised premises as reasonably may be, filling up or securing the useless pits or shafts, and levelling and rendering fit for tillage and cultivation the surface thereof, and the surface of the lands or grounds whereon or whereto the erections, buildings, and other things to be so broken down and removed, were standing or affixed, and the lands or grounds adjacent thereto, conformably to the usage and custom of similar mines in the said county of ——, and to the purport of the covenants in that behalf hereinbefore contained, and otherwise making good such damage as shall unavoidably be done."

ing and being in and upon the said lands and hereditaments; and in case of any damage or injury being done thereto by reason of the working and getting of the said mine, then, and in that case, they the said [*lessees*], their executors, administrators, or assigns, shall and will forthwith, at their own expense, repair and amend the said messuages and other buildings, to which any such damage or injury shall be done or extended; And the said [*lessees*] do hereby for themselves, their heirs, executors, administrators, and assigns, and each of them for himself, his heirs, executors, administrators, and assigns, doth covenant and agree with the said [*lessor*], his heirs and assigns, in manner following, (that is to say), that they the said [*lessees*], their executors, administrators, or assigns, shall and will well and truly pay or cause to be paid during the continuance of the said term hereby granted, unto the said [*lessor*], his heirs and assigns, the said surface rent, and all and singular other the rents, royalties and sums of money hereinbefore reserved and made payable as aforesaid, at the times and in the manner hereinbefore mentioned and appointed for payment thereof respectively, without any deduction or abatement whatsoever for taxes or otherwise, (except in respect of the land-tax now charged or hereafter to be charged upon the said hereditaments), in lawful money of Great Britain, or in notes of the Governor and Company of the Bank of England, or by means of one or more bill or bills of exchange, or other good and negotiable drafts or promissory notes, payable in London, respectively dated on the said several and respective quarterly days in each and every year hereinbefore mentioned, and to fall due and become payable at a period not exceeding two months from the date or respective dates of each and every of such bills, drafts, or promissory notes, and to be drawn and indorsed by or in the names of the said [*lessees*], their executors, administrators, or assigns, or the person or persons who for the time being shall carry on the works of the said mine and colliery: But it is hereby agreed and declared that such bills, notes, or drafts, shall not be deemed a satisfaction for the said rents, royalties, reservations, and sums of money, or any part thereof, for which they shall be given, unless such bills, drafts, or promissory notes shall be duly

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

Covenants to pay rents, &c.

Payment may be made by bank notes or bills of exchange.

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

honoured and paid when and as they shall become due respectively; *And further*, that they the said [*lessees*], their executors, administrators, and assigns, shall and will,

To pay taxes, &c.

from time to time and at all times during the said term, pay, bear, and discharge all rates, taxes, and charges whatsoever, parochial and Parliamentary, now imposed or hereafter to be imposed, in respect of the hereditaments hereby demised, or in respect of so much of the said pieces or parcels of land as shall for the time being be in the occupation of the said [*lessees*], their executors, administrators, or assigns, (except the land-tax), and shall and will at all times save harmless and keep indemnified the said [*lessor*], his heirs, executors, administrators, and assigns, therefrom; AND further, that they the said [*lessees*], their executors, administrators, or assigns, shall and will from time to time, and at all times during the said term, fence out, or cause to be fenced out with good and substantial posts and double rails, such part or parts of the said lands and hereditaments as they may dig, open, or use for the time being, for the purpose of working the said mines and premises hereby demised, and shall and will, from time to time and at all times hereafter during the said term, keep and preserve such fence or fences in good order and substantial repair; *And further*, that they the said [*lessees*], their executors, administrators, or assigns, shall and will, during the continuance of the said term, get and raise the several quantities of large or best coals hereinbefore agreed to be gotten or raised, in pursuance of the proviso or agreement hereinbefore contained, and subject to the terms and conditions thereof (*l*), and shall not nor will get or cause to be gotten a greater quantity of lumps or round coals, than shall be equal to one fifth part of the whole quantity of coals got, exclusive of slack; And in case a greater quantity of lumps or round coals shall be gotten than shall be equal to one fifth part of the whole quantity got, then such excessive quantity of lumps or round coals shall be paid for by the said [*lessees*], their executors, administrators, or assigns, as best or large coals;

To fence the land to be used.

To raise the several quantities before stipulated for.

(*l*) If the proviso in p. 38, is omitted, instead of the words "hereinbefore agreed," &c., insert the words "hereinbefore mentioned."

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

And further, that they the said [*lessees*], their executors, administrators, or assigns, shall not nor will, at any time during the said term, permit or suffer any common brick-clay, that may be gotten from and out of the said bed or stratum of common brick-clay hereby demised, to be carried away from the said lands and hereditaments, but shall and will cause such part of the said common brick-clay as they from time to time may think fit to convert into tiles, bricks, or quarries, to be so converted upon some convenient part of the said lands and hereditaments; *And further*, that they the said [*lessees*], their executors, administrators, or assigns, shall and will within six calendar months after the execution of these presents, at their own costs and charges, erect and set up, or cause to be erected and set up, on some convenient and suitable part or parts of the said hereditaments hereby demised, one or more good serviceable and correct weighing machine or machines, to the satisfaction of the said [*lessor*], his heirs or assigns, and shall and will from time to time keep and preserve the same weighing machine or machines in good and substantial order and repair during the said term; *And further*, that they the said [*lessees*], their executors, administrators, or assigns, shall not nor will, during the continuance of this demise, remove or carry away, or permit or suffer to be removed or carried away, any coals from the said demised premises, without causing the quantity or weight thereof to be carefully ascertained, by gauging the boat or boats in which the same shall be contained, in case such coals shall be removed in any boat or boats, or by weighing the coals so carried off, in case the same shall be removed by land carriage; *And further*, that they the said [*lessees*], their executors, administrators, or assigns, shall and will work the said mine hereby demised, and raise or get, or cause to be raised and gotten, the coal and slack therefrom, by means of shafts and pits to be sunk and made upon the said lands under which the said mine lies, and not elsewhere; and shall and will, in case it shall be necessary for the better and more effectually working of the said mine to sink any new pits or shafts, lay the brick-work necessary to be used and employed in the sinking and making of such new pits or shafts in good mortar, in a substantial and

Not to permit any common clay to be carried off.

To erect weighing machine.

Not to permit coals to be carried off without being gauged or weighed.

To get the mine by pits on the land.

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

workman-like manner; *And further*, that the said [*lessees*], their executors, administrators, or assigns, shall and will, previously to the sinking and making of any pit or shaft upon the said land and premises for any purpose whatsoever, and previously to the getting of any common brick-clay, or the stacking of any coal, or the burning of any coke, or depositing any soil or rubbish thereon, or the making of any kiln or kilns, spade and pare off and carry away all the turf and surface soil from off such part of the said lands as may then be in their occupation, for the purposes of working the said mine, and lay up the same in heaps in some convenient part of the said lands and hereditaments, and keep and preserve and leave the same on the said land, at the expiration or other sooner determination of the said term, for the use and benefit of the said [*lessor*], his heirs or assigns; and shall and will leave open, and protect and preserve with pit-eye pillars, every pit and shaft to be made and sunk by them in and upon the said lands and hereditaments, and leave the bricks and curbs in all and every of the said shafts, for the use and benefit of the said [*lessor*], his heirs and assigns, upon being paid and allowed by him or them such reasonable compensation in respect of such pit-eye pillars, so to be left for the support and preservation only of the said pits or shafts, as shall be agreed upon between the said parties hereto, or, in case of their disagreement respecting the same, as shall be awarded and settled by reference to arbitration under the clause for that purpose hereinafter contained; *And also*, that they the said [*lessees*], their executors, administrators, or assigns, shall and will during the continuance of the said term hereby granted, according to the best of their judgment, skill, and discretion, continue uninterruptedly (suspensions and stoppages by reason of any fault or failure in the mine or any inevitable accident only excepted,) to work, manage, get, raise, carry away, sell and dispose of the said mine of ten yard coal hereby demised, and proceed to bore, search for, dig, and drive such other pits, shafts, levels, and openings as may be deemed requisite and likely to tend to the discovery, winning, and getting of the said mine of ten yard coal and common brick-clay, for or on

To pare off the soil before opening pits, &c.;

and preserve and leave same upon the land.

To work mine uninterruptedly.

account of which a rent or royalty or reservation is hereby reserved and made payable; *And shall* and will, from time to time during the said term, raise and draw the slack that may be gotten in the said mine, or so much thereof as may be necessary to preserve the said mine clean, and not exposed to any damages by fire, and for the purposes aforesaid; And also, to the intent that the said works shall be continued and carried on with full and unabated vigour and effect during the continuance of the said term, that they the said [*lessees*], their executors, administrators, or assigns, shall and will constantly employ in and about the same mine and works, a proper number of good and skilful miners, colliers, workmen, servants, and labourers, and also of horses, cattle, carts, carriages, engines, machinery, utensils, tools, and other articles requisite for the carrying on and working of the said mine, in such a workman-like manner as shall tend to the mutual benefit, profit, and advantage of the said several parties hereto, or their respective representatives or assigns; And also shall and will, at their own costs and charges, at all times during the continuance of the said term, maintain and keep the hereditaments and premises hereby demised, and also all and singular the engines, machinery, whimseys, gins, shafts, erections, and buildings now standing and being, or at any time hereafter during the said term to be erected and built upon the said hereditaments and premises, or from time to time substituted in the place thereof, in good and tenantable order and repair; and shall and will, at the expiration or other sooner determination of the said term, deliver up all the pits and shafts made and sunk or hereafter to be made and sunk in or upon the said hereditaments, in a good and serviceable condition, and in good repair, without filling up or otherwise injuring the same, or rendering them in anywise useless and unserviceable for working and getting the said mine hereby demised, or the mines of coal and iron-stone and other mines hereinbefore excepted out of this present demise; and shall and will, in case the said [*lessor*], his heirs or assigns, shall by any writing under his or their hand or hands request the same, (but not otherwise), fill up and level all and every, and such and so many of the said pits or shafts as

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

To raise slack.

To employ proper number of workmen.

To keep premises and machinery in repair.

To deliver up shafts in serviceable condition.

If requested, to fill up pits and restore land to cultivation.

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

they may be so requested to fill up and level, and restore the said land and hereditaments into a state proper for cultivation, so far as circumstances will permit; but it is hereby expressly provided and declared, that the said [*lessees*], their executors, administrators, or assigns, shall not be required or held liable to fill up or level such pits or shafts as are now made and sunk upon the said hereditaments, or to level and restore to a state proper for cultivation such parts of the said lands as are now broken up for the purpose of working the said mine, such pits or shafts as last mentioned being delineated and marked out in the said map or plan hereunto annexed as aforesaid (*l*); *And further*, that in case the said [*lessor*], his heirs, or assigns, at the expiration or other sooner de-

Lessor to be at liberty at the end of term to

(*l*) Sometimes the lessees covenant to fill up the pits from time to time as the veins are exhausted.

Covenant to fill up pits so as to render the surface fit for cultivation.

"*And also*, that the said [*lessees*], their executors, administrators, or assigns, shall and will, so often as the pits or shafts sunk and to be sunk in or upon the said demised premises shall, by reason of the exhaustion of the mines or veins, become useless, fill up the same pits or shafts, or arch over the same with bricks, in a workman-like manner, burying therein the soil and rubbish which shall have been raised or gotten out of the said pits or shafts, and cover over the mouths of the said pits or shafts with good earth or soil; And will or shall at the same time level the land or ground immediately surrounding or adjacent to the same pits or shafts, so as to render the surface of the same pits or shafts, and of the land or ground connected therewith, fit for tillage, according to the custom of the country; And will or shall, when and as all the erections, buildings, engines, furnaces, machinery, iron-work, or other apparatus, to be erected, built, constructed, or fixed by the said [*lessees*], their executors, administrators, or assigns, in or upon the said demised premises, during the said term hereby granted, shall be taken down and removed, in like manner level the site or surface of the land or ground whereon or whereto the same were respec-

termination of the said term, shall be desirous of purchasing all or any part or parts of the engines, whimseys, and machinery, tools, implements, ropes, rollers, chains, skips, or other articles and things then being used and employed in the said works of the said mine, and which they the said [*lessees*], their executors, administrators, or assigns, shall or may be authorized to remove and carry away, the said [*lessees*], their executors, administrators, or assigns, shall and will, upon receiving notice in writing of such desire, by the space of six calendar months before the expiration or other sooner determination of the said term, or —— days after the determination thereof in the event hereinbefore mentioned, leave and yield up unto and for the said [*lessor*], his heirs or assigns, all or any, or such part of the said engines, whimseys, machinery, tools, implements, ropes, chains, rollers, and other articles and things as aforesaid, he the said [*lessor*], his heirs or assigns, paying such price or prices for the same as shall, in case of the disagreement of

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

purchase engines, machinery, &c.

Giving six calendar months' notice.

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tively erected, built, constructed, or fixed, and the land or ground immediately surrounding or adjacent to the same, so as to render such land or ground fit for tillage and cultivation, according to the custom of the country; And also, that the said [*lessees*], their executors, administrators, or assigns, will or shall, from time to time, at their own costs and charges, immediately after they shall have gotten and exhausted the clay, brick-earth, sand, and other materials for the making of bricks from any part or parts containing —— or upwards of the said five acres of land or ground, from which they are hereinbefore authorized to dig and get sand, clay, and other materials, fill up, level, and lay down the same with grass or clover-seeds, in a husband-like manner; And will not nor shall proceed to dig or get any clay or other such materials as last aforesaid from any other part or parts of the said five acres, before the part or parts whence the clay and other materials aforesaid shall have been previously gotten and exhausted, shall be so filled up, levelled, and laid down as aforesaid."

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

the said parties respecting the same, be awarded and settled by reference to arbitration, in pursuance of the clause for that purpose hereinafter contained; *And further*, that they the said [*lessees*], their executors, administrators, or assigns, shall not nor will during the continuance of the said term, nor after the expiration or other sooner determination thereof, do or commit, or suffer to be done or committed, any wilful neglect, act, matter, and thing whatsoever, which may in anywise damage, hazard, or endanger the said hereinbefore excepted mines and premises, or the future working thereof, nor shall or will omit or neglect to do, or cause to be omitted or neglected to be done, any act, matter, or thing, by which omission or neglect the future working of the said mines and premises hereinbefore excepted may be prevented, endangered, or postponed; *And also*, that they the said [*lessees*], their executors, administrators, or assigns, shall and will during the continuance of the said term of thirty years hereby granted, keep, or cause to be kept, in some convenient part of the said lands and hereditaments, or as near thereto as may be convenient to all the said several parties interested therein, regular books, wherein shall be entered fair and open just and regular accounts in writing, from time to time, of the said several quantities of large or best coals, lumps or round coal, slack and clay, which shall from time to time be gotten or raised from and out of the said mines and premises hereby demised, and of the quantity of coke, and of bricks, tiles, and quarries, made upon the said hereby demised premises, and of such quantities of the said articles as shall be sold and carried away, or used, consumed, and employed in or about the works of the said mine and premises, and that such accounts shall contain particular and correct entries of the said several weights, prices, and quantities, and also of the several times and dates of such gettings, raisings, sales, conversions, use, and consumption, and also of the numbers of the boats, and the names of the owners and steerers thereof, and also of the owners of waggons, carts, carriages, horses, and other beasts, by which the same articles may be carried away respectively, and also shall and will make such entries in the said books of account, at the time or

Lessee not to do or neglect any act so as to endanger mines.

Lessees to keep books of account on the land.

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

respective times of ascertaining the said several weights, prices, and quantities; *And also,* shall and will permit or suffer the said [*lessor*], his heirs or assigns, or his or their agent or agents for the time being, at all reasonable times, to inspect the said books of account, and to make copies thereof, or extracts therefrom; *And* shall and will, on the Saturdays next succeeding each and every of the four quarterly days or times aforesaid, *viz.* the twenty-fourth day of June, the twenty-ninth day of September, the twenty-fifth day of December, and the twenty-fifth day of March, in each and every year, during the said term, at their own expense, make out and deliver, or cause to be made out and delivered, unto the said [*lessor*], his heirs or assigns, or his or their agent or agents, a true, full, and correct copy of the said books of account for the then preceding quarter; *And further,* shall and will permit and suffer the agent or agents, bailiff or bailiffs, of the said [*lessor*], his heirs or assigns, at all times during the continuance of the said term, constantly or occasionally, as he or they shall think fit, to reside in some convenient dwelling-house of the said [*lessees*], their executors, administrators, or assigns, in and upon the said hereditaments, without any hinderance or interruption by or from the said [*lessees*], their executors, administrators, or assigns, or their agents, workmen, or servants (*m*) (*n*); *And also* shall and will permit and suffer the said [*lessor*], his heirs or assigns, or his or their agents, workmen, servants, or any other person or persons whom he, she, or they may appoint,

And suffer lessor to inspect books.

To deliver quarterly accounts.

To suffer lessor's agent to reside on premises.

Lessor to be at liberty to enter upon and examine the mines.

(*m*) *Qu.* "and without paying rent for the same."

(*n*) "*Also* that the said [*lessees*], their executors, administrators, or assigns, will or shall, at all times during the said term hereby granted, supply and provide [A. B.] the present bailiff or agent, and the future bailiff or agent for the time being of the said [*lessor*], his heirs or assigns, employed in or about the superintendance or inspection, on their behalf, of the said colliery and works, with a sufficient quantity of the best coal to be gotten from the said mines and veins, not exceeding the quantity of —— tons

To supply lessor's agent with coal gratis.

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

to enter upon the said land, mine, and hereditaments, at any seasonable time, and to survey and inspect, and make plans of the said mines and works, and to see whether the same are in good and substantial order, condition, and repair, and are worked, managed, and carried on in a proper and workman-like manner, according to the true intent and meaning of these presents; and shall and will help and assist such person or persons so entering as aforesaid by means of their agents and other workmen, and permit them to have the use of the engines, implements, and utensils for the purposes aforesaid; *And further*, that they the said [*lessees*], their executors, administrators, or assigns, shall and will, from time to time, upon demand, pay the several occupiers and tenants for the time being of the said lands under which the said mines hereby demised are situate, reasonable satisfaction for any damage that may be committed or occasioned on their respective lands, or the crops growing thereupon, by working of the said mines, or carrying or not carrying away the produce thereof, or any materials to or from the said premises; the amount of such payment or satisfaction, in case of dispute, to be settled by reference to arbitration, in pursuance of the clause for that purpose hereinafter mentioned; And also that the said [*lessees*], their executors, or administrators, shall not nor will, during the continuance of this present demise, assign over or underlet, or agree to demise, assign, or underlet the said mines, hereditaments, and premises hereby demised, or intended so to be, in parts or parcels, or in a less quantity and proportion than the whole of the said mines, hereditaments, and premises, or in a less proportion than their respective whole undivided shares or interests in the entirety of the same mines, hereditaments and premises, for all or any part of the said term hereby granted, or in-

Lessees to make satisfaction to tenants for injury done to lands.

Not to assign or underlet in parcels.

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in any one year, for the use and consumption of himself and his family, at his dwelling-house for the time being in the said parish of ——, without demanding any consideration or recompense for such coal, or the loading or delivering thereof."

tended so to be, without the licence and consent in writing of the said [*lessor*], his heirs or assigns, for that purpose first had and obtained (*o*); PROVIDED ALWAYS, *and it is hereby covenanted, agreed, and declared between and by the said parties hereto,* and these presents are upon this express condition, that in case all or any of the rents, royalties, and reservations hereinbefore reserved, or the sum or sums of money hereinbefore made payable in respect thereof, shall happen to be unpaid in part or in the whole, by the space of twenty-one days next after either of the said quarterly days or times of payment hereinbefore appointed for payment thereof, then and in every or any such case, after demand made of the said rents, royalties, or reservations so in arrear, it shall be lawful to and for the said [*lessor*], his heirs or assigns, to stop and hinder the loading and sending any coal, slack, coke, bricks, tiles, or clay from off the said premises, and also to enter upon and distrain all and every or any of the coal, slack, coke, bricks, tiles, or clay, and also the horses, gins, engines, whimseys, waggons, carts, ropes, rollers, tools,

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

Power of distress in case of non-payment of rent.

(*o*) If the restriction is to extend to an assignment or underletting in *any* manner without consent, and to include also assignments by operation of law, the terms of the covenant will be:—

"AND ALSO that the said [*lessees*], their executors, administrators, or assigns, shall not nor will, at any time or times during this demise, otherwise than by their respective last wills and testaments, give, grant, demise, let, assign, set over, or otherwise part with, or cause to be given, granted, demised, let, assigned, or set over, either by their or any of their act, deed, permission, or sufferance, or by any act or operation of law, this present indenture of lease, or the premises hereby demised, or any part or parcel thereof, or the possession or occupation thereof, or all or any of the powers and privileges hereby granted, or the benefit or advantage thereof, or their or any of their estate, property, or interest therein, or in any part of the said term hereby granted, without the special licence and consent of the said [*lessor*], his heirs or assigns, first obtained for that purpose."

Covenant not to alien, except by will, without licence.

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

live and dead stock, utensils and materials, used and employed in and about the said demised works and premises, and also all goods, chattels, and effects whatsoever, being on the said demised lands, hereditaments, and premises, or which shall be found thereupon, or in or about the same, and the distress and distresses then and there found to take, lead, and carry away, and to sell and dispose of the same in like manner as in cases of distresses for rent reserved on common leases for years, and out of the money arising by such sale (if any) to retain and take all arrears of the said rents, royalties, and reservations, and also the costs and charges of making and keeping such distresses, and of the sale thereof, rendering the overplus (if any) unto the said [*lessees*], their executors, administrators, or assigns; PROVIDED ALSO, *and it is hereby further covenanted, agreed, and declared between and by the said parties hereto*, and these presents are upon this express condition, that in case all or any of the said rents, royalties, and reservations hereinbefore reserved, or the sum and sums of money hereinbefore made payable, shall happen to be unpaid in part or in the whole, by the space of forty-two days next after either of the said quarterly days or times hereinbefore appointed for the payment thereof, and the same shall be demanded on the expiration of those days, or at any time afterwards, and shall not be paid at the time of such demand, and no sufficient distress or distressess can or may be found or gotten on the said demised premises to answer such arrear or arrears, or in case the said [*lessees*], their executors, administrators, or assigns, shall refuse or neglect to pay the taxes and rates to become due and payable for and in respect of the said demised premises, (except as hereinbefore mentioned), and to indemnify the said [*lessor*], his heirs and assigns, therefrom, or if the said [*lessees*], their executors, administrators, or assigns, shall not effectually work the said mines or minerals hereby demised, or shall demise, assign over, or underlet, or agree to demise, assign, or underlet the said demised mines, hereditaments, and premises, in parts or parcels, or in a less quantity than the whole of the said mines, hereditaments, and premises, or in a less proportion than their whole undivided shares or interests in the entirety

Proviso for re-entry on non-payment of rent, and no sufficient distress, and on certain specified acts and defaults of lessees.

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

of the same mines and hereditaments and premises, for all or any part of the said term hereby granted, (without the consent in writing of the said [*lessor*], his heirs or assigns), (*p*) or if the said [*lessees*], their executors, administrators, or assigns, shall neglect or refuse to build, erect, complete, and finish one blast-furnace at least, with a steam-engine, and other necessary and appropriate machinery and appendages thereto, within the time, or shall neglect or refuse to work and carry on the same in the manner hereinafter mentioned and agreed upon in and by the covenant hereinafter in that behalf contained, then and from thenceforth, for all or any of the said last-mentioned causes, it shall be lawful for the said [*lessor*], his heirs or assigns, into all and singular the said demised premises, or into any part thereof in the name of the whole, to re-enter, and the same to have again, repossess, and enjoy as in his and their first and former estate, any thing herein contained to the contrary notwithstanding. AND the said [*lessor*], as mortgagee of the said hereditaments hereby demised, doth for himself, his heirs, executors, administrators, and assigns, covenant and agree with the said [*lessees*], their executors, administrators, and assigns, by these presents, in manner following, (that is to say), that he the said [*lessor*], his heirs and assigns, shall and will permit and suffer the pits and shafts now

Covenants by lessor,

to permit shafts already made to be used by lessees.

(*p*) If the lease is to become void upon the lessee's becoming bankrupt or insolvent, &c., add:—

Or if the lessee shall become bankrupt, insolvent, &c.

"or if the said [*lessees*], their executors, administrators, or assigns, or either or any of them, shall be duly declared a bankrupt or bankrupts, insolvent or insolvents, within the laws now in force or which shall be in force relating to bankrupts or insolvents, or shall make a composition with all or the major part in value of his or their creditors, or any execution, extent, or other legal process shall issue against the said [*lessees*], their executors, administrators, or assigns, or any of them, under and by virtue of which this lease, or the term hereby granted, shall be seized or levied on."

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

made and sunk upon the said demised premises to be used and enjoyed by the said [*lessees*], their executors, administrators, or assigns, during the continuance of the said term; *And further*, that in case the said [*lessor*], his heirs or assigns, shall at any time or times hereafter, during the continuance of the said term, enter upon or take possession of any part of the said hereditaments, for the purpose of working and getting the said excepted mines of coal, iron-stone, and clay, he the said [*lessor*], his heirs or assigns, shall and will, within three calendar months next after he or they shall so take possession as aforesaid, pay and allow unto the said [*lessees*], their executors, administrators, or assigns, a full and adequate compensation for all and every the necessary pit-eye pillars that shall be left in such pits or shafts for the support only and preservation thereof, and for all and every engines, whimseys, machinery, articles and things to be used by them or their agents, workmen, and miners, in the working, getting, raising, and converting of the said excepted mines of coal and iron-stone, and shall and will make and allow a proportional abatement out of the surface rent hereinbefore reserved in respect of such part of the said lands and hereditaments then in the occupation of the said [*lessees*], their executors, administrators, or assigns, as shall be so taken, entered upon, and occupied by the said [*lessor*], his heirs or assigns, for the purposes aforesaid; the amount of the compensation aforesaid, and of such abatement of the said surface rent, to be settled and determined, in case of the disagreement of the parties respecting the same, by reference to arbitration, in pursuance of the clause hereinafter for that purpose contained (*q*); *And further*, that he the said [*lessor*], his heirs

In case lessor shall work excepted mines, to allow compensation for pit-eye pillars, &c.

(*q*) Where lands are demised for the purpose of working mines, and the lessor has adjacent lands let from year to year, which may possibly be wanted for the purpose of working the mines, a clause to this effect is frequently added:—

Covenant by lessor to let other lands that may be wanted for the working of

"And that the said [*lessor*], his heirs or assigns, will at any time, or from time to time during the said term hereby granted, at the request in writing, and at the costs and

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

or assigns, in case at any time during the said term he or they shall be desirous of selling and disposing of, or agreeing to sell and dispose of, or letting and demising, or agreeing to let or demise, all or any part or parts of the iron-stone and heathen coal lying under the said lands and hereditaments hereinbefore mentioned and described, by royalty or otherwise, shall and will give six calendar months' notice in writing of such his or their desire and intention unto the said [*lessees*], their executors, administrators, or assigns, or leave the same at their respective places of abode, and shall and will in such notice specify the price, rent, or royalty, or the several prices, rents, or royalties for which he or they shall be so willing to dispose of or demise the said iron-stone and heathen coal, or any part thereof;

If lessor sells or lets iron-stone and heathen coal, the same to be first offered to the lessees.

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charges of the said [*lessees*], their executors, administrators, or assigns, give such notice or notices to quit to the tenant or tenants, occupier or occupiers, of any of the lands or grounds of the said [*lessor*], in the said parish of ——, not hereby demised, which shall be required by the said [*lessees*], their executors, administrators, or assigns, for the purpose of sinking any pit or shaft, or erecting any engine, or otherwise prosecuting and carrying on the said colliery and works, and take such other steps, and use and pursue such other ways and means as shall be necessary or proper for putting an end to the existing tenancy or occupation of the land or ground so required, and obtaining possession thereof, and will or shall, at the like request, costs, and charges, immediately after possession thereof shall be obtained, let and set the same to the said [*lessees*], their executors, administrators, or assigns, as tenants from year to year, at the same or the like rents, and upon the same or the like terms and conditions as the outgoing tenant or tenants held the same, or as near thereto as may be, without prejudice to the several powers and privileges hereinbefore granted, and the several covenants, conditions, and agreements hereinbefore contained for restraining or regulating the exercise of the same powers and privileges, so far as the same relate to or concern the same lands or grounds."

the mines, and determine existing tenancies.

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

And in case the said [*lessees*], their executors, administrators, or assigns, shall be willing to purchase the said iron-stone and heathen coal, or to accept a lease thereof upon the terms mentioned in such notice, and shall notify their acceptance of the said terms unto the said [*lessor*], his heirs or assigns, within six calendar months next after the delivery of the said notice, that then and in such case, he the said [*lessor*], his heirs and assigns, shall and will, at the costs and charges of the said [*lessees*], their executors, administrators, or assigns, execute, or cause to be executed, all such deeds or instruments as may be deemed necessary for completing such sale, or granting such lease of the said iron-stone and heathen coal, as the case may be; *And further*, that in case the said [*lessees*], their executors, administrators, or assigns, shall refuse to purchase or to accept a lease of the said iron-stone and heathen coal, upon the terms, and at the prices, rents, or royalties so to be proposed by the said [*lessor*], his heirs or assigns, and shall, within two calendar months after such offer made by the said [*lessor*], his heirs or assigns, notify unto the said [*lessor*], his heirs or assigns, the terms upon which they may be willing to purchase or to accept a lease of the said iron-stone and heathen coal, that he the said [*lessor*], his heirs or assigns, shall be at liberty either to accept or reject the terms to be proposed in the last-mentioned notice; but in case of his or their rejecting the same, then and in that case he the said [*lessor*], his heirs or assigns, shall not nor will sell or demise all or any part of such iron-stone and heathen coal unto any other person or persons whomsoever, unless at a price or sum greater than that which shall have been so offered by the said [*lessees*], their executors, administrators, or assigns, as aforesaid; but it is hereby provided and expressly agreed between the said several parties hereto, that notice shall be given by the said [*lessees*], their executors, administrators, or assigns, of the terms upon which they are willing to accept a lease of, or to purchase, such iron-stone and heathen coal, within the said six months after the said [*lessor*], his heirs or assigns, shall have given such notice of his or their desire to grant such lease, or contract for such sale as aforesaid; and in default of such notice by the said

Proviso in case lessees shall reject the terms proposed, but shall offer other terms.

[*lessees*], their executors, administrators, or assigns, the said [*lessor*], his heirs and assigns, shall be at liberty to sell or demise the said iron-stone and heathen coal unto any person or persons whomsoever, and upon whatever terms he or they may think proper. PROVIDED ALSO, *and it is hereby declared and agreed by and between the said parties hereto*, that if, at any time during the continuance of the said term of thirty years hereby granted, or after the expiration or other sooner determination thereof respectively, any variance, controversy, doubt, dispute, or question shall arise between the said parties hereto, or their respective representatives or assigns, touching or relating to these presents, or any clause, proviso, covenant, matter, or thing herein contained, or as to the construction of the same, or in any respect relating to the premises hereby demised and granted, the same shall be and is hereby agreed to be referred to arbitration and umpirage, in manner following, (that is to say), in any such cases the parties desiring and intending to refer the same to arbitration shall, within one calendar month after such question, doubt, dispute, or difference shall have arisen, give notice in writing to the other of the said parties, or some or one of them, by leaving such notice in writing at his, her, or their last or most usual place or places of abode or residence, naming in such notice the person who is or shall be chosen by him, her, or them, as his, her, or their arbitrator in the matter, point, or question in dispute, intended to be referred to arbitration, and requiring the other party or parties to name or choose his, her, or their arbitrator, within two calendar months from the time of the serving such notice; And if within the period of two calendar months, to be computed as aforesaid, the person or persons, upon whom or at whose place or places of abode or residence such notice shall have been so served or left as aforesaid, shall not have given unto the person or persons so serving or leaving the same, a notice in writing, to be served or left as aforesaid, containing the nomination and appointment of an arbitrator on his or their part, then it shall be lawful for the person or persons desiring such reference to name a second arbitrator, who is hereby empowered and enabled

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

Agreement for referring disputes to arbitration.

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

to act in every respect, and in the same manner, as if he had been named and appointed by the party refusing, neglecting, or omitting to name and appoint another arbitrator as aforesaid; And in every such case, such two arbitrators shall, before they enter upon the matter or business so referred to them, and within two weeks after they shall have been so named and appointed, nominate and elect some person to be umpire, and finally to decide in case of their disagreement; And it is hereby further agreed between the said several parties hereto, that when and so often as any dispute or disputes shall arise between the said parties, all and every the book and books of account, writing or writings, and all other papers in anywise relating to or connected with such dispute or disputes, in their or any or either of their custody or power, shall be produced and delivered to the said arbitrators or umpire for their inspection and guidance in adjusting and settling such dispute or disputes; And it is hereby further agreed by and between the said parties hereto, that the submission hereby made shall or may be made a rule of his Majesty's Court of King's Bench at Westminster; And that in case the same shall be required by either of the parties in difference, the said respective parties shall execute arbitration-bonds to each other, and in the conditions thereto subscribed shall be clearly set forth and contained the question, point, or matter in difference, and the time or period of making and delivering such award or umpirage, [and also the assent of the said parties that the submission to such award or umpirage shall be final and conclusive, and be made a rule of his Majesty's said Court of King's Bench at Westminster (*q*)]. And the said [*lessor*] doth

Covenant by lessor for quiet enjoyment.

(*q*) The arbitration-clause may be more shortly expressed as follows:—

Shorter form of agreement to refer disputes to arbitration.

"And *it is hereby declared and agreed by and between the said parties to these presents*, that if at any time during the continuance or after the determination of this demise, any dispute, doubt, or question shall arise between the said [*lessor*], his heirs or assigns, and the said [*lessees*], their executors, administrators, or assigns, or either or

hereby lastly for himself, his heirs, executors, administrators, and assigns, covenant, promise, and agree to and with

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

any of them, either on the construction of these presents, or respecting any matter or thing whatsoever arising out of or connected with this present demise or lease, or any of the covenants, conditions, stipulations, and provisions hereinbefore contained, then every such dispute, doubt, or question shall be referred to the arbitration of two indifferent persons, one to be named by each party in dispute, or in case either of the parties in dispute shall refuse to join in such nomination, then both of the said arbitrators to be named by the other of the said parties; and in case such referees cannot agree upon an award, then the said dispute, doubt, or question shall stand referred to the umpirage or arbitration of such one person as the said two referees shall, before they shall proceed in the reference, by any writing under their hands appoint, so that every such reference shall be made within forty days next after such dispute, doubt, or question shall arise; and the award or determination which shall be made by the said two referees, or by their umpire, concerning the premises, shall be final and conclusive on the parties in difference respectively, so as such referees shall make their award in writing under their hands, within forty days next after the reference to them, and so as such umpire shall make his determination in writing under his hand, within twenty days after the time appointed for making the award of the said referees shall be expired; And it is hereby further agreed, that this submission to reference may be made a rule of his Majesty's Court of King's Bench at Westminster, on the application of either of the parties to the reference; And also that no suit at law or in equity shall be commenced or prosecuted against the referees or their umpire concerning any of the matters or things so to be referred to them or him as aforesaid, or concerning their or his award or determination; and that the several and respective parties to such reference shall submit to be examined by the said referees or their umpire upon oath, to be administered in such manner as the

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

the said [*lessees*], their executors, administrators, and assigns, that they the said [*lessees*], their executors, administrators, and assigns, duly paying the said several rents, royalties, reservations, and sums of money hereby reserved and made payable, and observing, performing, fulfilling and keeping all and singular the covenants, clauses, provisoes, conditions, exceptions, and agreements hereinbefore made and contained, and which on the part of the said [*lessees*], their executors, administrators, and assigns, are or ought to be paid, done, performed, fulfilled, and kept, shall, and lawfully may, peaceably and quietly have, hold, use, occupy, possess, and enjoy all and singular the said hereby demised premises, with the appurtenances, during the continuance of the said term, without the let, suit, hinderance, trouble, eviction, disturbance, claim, or demand of the said [*lessor*], his heirs, or assigns, or any other person or persons lawfully claiming or to claim by, from, through, under, or in trust for him or them.

Recital of contract for sale of piece of land, for the purpose of erecting a blast furnace.

And whereas the said [*lessor*] hath contracted and agreed with the said [*lessees*] for the sale to them of all that piece or parcel of land, containing, by a late survey and admeasurement thereof, two acres and sixteen perches, or thereabouts, be the same more or less, as the same is now staked out and measured, and taken from and

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said referees or their umpire shall direct, for the discovery of any of the facts or circumstances relating to the matters to be referred as aforesaid*; And it is hereby further agreed that no suit at law or in equity shall be commenced or instituted by either of the parties in dispute against the other of them, touching the matters in dispute, before the party to be made defendant or defendants to such suit or suits shall have refused or neglected to refer the matter in difference respectively to arbitration, pursuant to the agreement hereinbefore contained, or unless the time limited for making such award or determination shall be elapsed or expired without any such award or determination having been made†."

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* *Sed vide ante*, Vol. 2, p. 623. † Ib. p. 627.

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

being part of two closes or parcels of land, called the ——, and delineated in the said map or plan hereunto annexed, for the purpose of building and erecting thereupon one or more blast furnace or furnaces for smelting iron-stone, with an engine and other machinery thereto, in order to enable them the said [*lessees*], their executors, administrators, and assigns, the better to consume and dispose of the coals which shall be got and raised out of the said mine of ten yard coal hereby demised, and which will tend to the mutual advantage of themselves and the said [*lessor*], his heirs and assigns respectively; and the same piece or parcel of land so contracted to be sold as aforesaid, is intended to be released or otherwise assured unto them the said [*lessees*], and their heirs, by certain indentures of lease and release, already prepared, and intended to be dated respectively, the lease on the day next before, and the release on the day of the date of these presents; *Now*, therefore, the said [*lessees*] do hereby for themselves jointly, and for their heirs, executors, administrators, and assigns, and each of them doth for himself severally, and for his heirs, executors, administrators, and assigns, covenant and agree with the said [*lessor*], his heirs and assigns, in manner following, (that is to say), that they the said [*lessees*], their executors, administrators, or assigns, shall and will, within the space of two years from the day of the date of these presents, erect, build, and complete, or cause to be erected, built, and completed upon some convenient part of the said piece or parcel of land, hereditaments, and premises so contracted to be purchased by them as aforesaid, and comprised in the last-mentioned indentures of lease and release respectively, one blast furnace at the least, with a steam engine, and other necessary and appropriate machinery and appendages thereto, in a good and workman-like manner; and shall keep the same in repair during the said term hereby granted; and when and as soon as such blast furnace, engine, and other machinery shall be so completed and finished, shall and will, also at their own expense, begin and continue to work the same, without intermission, during the said term hereby granted, (suspensions, stoppages, and interruptions by inevitable

Covenant by lessees within two years to erect a furnace with a steam engine, &c.

OF A COAL MINE, &c. BY A MORTGAGEE UNDER A POWER.

accidents, or for the purpose of repairing the same, only excepted) (*a*). IN WITNESS, &c.

(*a*) The clause authorizing the lessees to give up any part of the lands upon which they shall have entered, when it is no longer wanted for the purposes of the colliery, as suggested *ante*, p. 29, may be expressed as follows—

Lessees to be at liberty to give up any part of lands upon which they shall have entered.

"PROVIDED ALWAYS, *and it is hereby declared and agreed by and between the said parties to these presents*, that if at any time or times during the said term hereby granted, the said [*lessees*], their executors, administrators, or assigns, shall be desirous of relinquishing the possession of any part or parts of the said lands, which they shall have entered upon, occupied, or used in pursuance of the liberties, powers, and authorities hereinbefore granted, [other than the said lands hereby immediately demised], the same being no longer wanted by them for the purpose of working and carrying on the said coal-mines and works, and shall give to the said [*lessor*], his heirs or assigns, six calendar months' previous notice in writing of their intention to deliver up to him or them the possession of the same land, such notice to expire on one of the quarterly days of payment hereinbefore mentioned, then and in such case, and so often as the same shall happen, the term and tenancy of the said [*lessees*], their executors, administrators, or assigns, therein, shall, from and immediately after the expiration of the said notice, and the performance by the said [*lessees*], their executors, administrators, or assigns, of all and singular the covenants and agreements herein contained concerning the same land or lands, up to the period of the delivery of possession thereof, cease and determine; and the surface rent hereinbefore reserved, and all and singular the covenants and agreements hereinbefore contained concerning the same land, and which, on the part of the said [*lessees*], their executors, administrators, or assigns, ought to be paid and performed, shall thenceforth cease and determine and be absolutely void, any thing hereinbefore contained to the contrary thereof notwithstanding."

OF A MILL AND FARM, PART FREEHOLD AND PART COPYHOLD.

LEASE *from* DEVISEES, *in pursuance of a* POWER, *of a* WATER-MILL *and* FARM, *partly* FREEHOLD *and partly* COPYHOLD. RESERVATION *of* RIGHT *of* ENTRY *to* CUT TIMBER, *(the Trees themselves being not excepted in the Demise);* HABENDUM *as to* FREEHOLDS *for* —— *Years,* DETERMINABLE *on a* GIVEN DAY *after the* DECEASE *of Testator's* WIDOW; HABENDUM *as to* COPYHOLDS *for* ONE YEAR, *and, if the* CUSTOM *of the* MANOR PERMIT, *from* YEAR *to* YEAR *during the said Term.* LAST HALF YEAR'S RENT *reserved to be paid on a given Day* BEFORE *the* TERMINATION *of the* LEASE. COVENANT *by* LESSEE *to* REPAIR MILL, *&c.* —*by* LESSOR, *at the* END *of* EACH YEAR, *to* EXECUTE *a* LEASE *of the* COPYHOLDS *for* ONE YEAR.

THIS INDENTURE, made the —— day of ——, ——, BETWEEN [*lessors*], of &c., of the one part; and [*lessee*], of &c., miller, of the other part. WHEREAS [*testator*], of ——, deceased, did in such manner as the law requires for the validity of devises of freehold estates, duly sign and publish his last will and testament in writing, bearing date the —— day of ——, in the year ——, and did thereby, after appointing his son-in-law, [*renouncing executor*], of ——, gentleman, and the said [*lessors*], executors of his said will, devise all and singular his messuages, lands, tenements, water-mill, and hereditaments, in —— aforesaid, and all other his real estates whatsoever, unto the said [*lessors and disclaiming devisee*], their heirs and assigns; *Upon trust* to let and demise his messuages, lands, water-mill, hereditaments, and real estate, during the life of his wife [*wife*], and after her decease upon

Parties.

Recital of will conferring power to lease.

OF A MILL AND FARM, PART FREEHOLD AND PART COPYHOLD.

other trusts in the said will mentioned; and the said [*testator*] declared that such leases should be made determinable with the life of his said wife, or on a day certain within one year after her death (*a*). And whereas the said [*testator*] afterwards departed this life without having altered or revoked his said will, which, on the —— day of ——, was duly proved by the said [*lessors*] alone, in the

Death of testator.

(*a*) The object of thus extending the lease beyond the life is, to prevent it from being suddenly determined by the death of the *cestui que vie*, at an inconvenient time of the year. If a lease, determinable on a contingency, expire after the lessee has sown the ground, he, or his representative, is entitled to enter and reap the crops thus sown. On this subject see *Knivet's* case, 5 Rep. 85 a; *Oland's* case, Ib. 116; *Geanes* v. *Portman*, Cro. El. 314; *Latham* v. *Atwood*, Cro. Car. 515; *Arnold* v. *Skeale*, Noy, 149. The rule applies as well where the demise is determined by the act of the lessor, as by any collateral event, but not where the term ceases on a given day by effluxion of time; Co. Litt. 55. a.; or where it is determined by the act or default of the lessee. Thus, in a late case, where a lease contained a condition, authorizing the lessor to re-enter if the lessee contracted a debt on which he should be sued to judgment, which should be followed by execution; and the lessor re-entered by virtue of this condition in consequence of a judgment and execution against the lessee; the lessor was held to be entitled to the emblements. *Davis* v. *Eyton*, 7 Bing. 154.

Tenant's right to emblements.

The rights of the outgoing tenants, in regard to crops sown by them, are generally regulated by express contract, or by local custom, the most usual of which is, that the outgoing tenant shall leave the last year's manure, and, not unfrequently, the last year's crops on the land, on being paid their value by the landlord or the succeeding tenant. (As to the reasonableness of such customs see *Dalby* v. *Hirst*, 3 J. B. Moore, 536; *S. C.* 1 Brod. & Bing. 224; *Senior* v. *Armitage*, Holt, N. P. 197). It has been held, that a covenant to leave manure on the farm, and sell it to the incoming tenant at a valuation, gives the outgoing tenant a right of onstand, so that he may maintain trespass against the incoming tenant, who removes it before the valuation. *Beaty* v. *Gibbons*, 16 East, 116.

Where the tenant was entitled, by the terms of the lease, to enter and reap the last year's crops, *so as the land was summer fallowed, &c.*, it was held that the succeeding tenant could not maintain an action against him for carrying away the crops, on the allegation, that the terms of the covenant, as to the cultivation, had not been complied with on his part, since this did not change the property in the crops, but formed the ground for an action by the landlord. *Boraston* v. *Green*, 16 East, 71.

OF A MILL AND FARM, PART FREEHOLD AND PART COPYHOLD.

Court of the Archdeaconry of Norwich. AND WHEREAS, the said [*disclaiming devisee*] having declined to act in the execution of the said will, and having duly renounced and disclaimed the said trust estate, the said [*lessors*], as the acting trustees of the said will, have, in pursuance of the trust thereby reposed in them, agreed to demise the hereditaments hereinafter mentioned, being part of the hereditaments so devised to them and the said [*disclaiming devisee*], as aforesaid, unto the said [*lessee*], his executors, administrators, and assigns, upon the terms and subject to the covenants and agreements hereinafter contained. NOW THIS INDENTURE WITNESSETH, that, in consideration of the yearly rent hereby reserved, and of the covenants and agreements hereinafter contained, and by or on the part of the said [*lessee*], his executors, administrators, and assigns, to be paid, observed, and performed, *They* the said [*lessors*] *have* demised, leased, and to farm letten, *And* by these presents *do* demise, &c. unto the said [*lessee*], his executors, administrators, and assigns, ALL THAT messuage, late of the said [*testator*], with the barns, stables, and other out-buildings, yards, gardens, orchards, closes, inclosures, pieces and parcels of arable, meadow, and pasture land, to the same belonging, and now occupied and enjoyed therewith, situate, lying, and being in —— aforesaid, in the said county of ——, containing in the whole, by estimation, ———, (more or less), *And also*, all that water-mill, called —— mill, late of him the said [*testator*], situate in —— aforesaid, with all and singular the going gear and machinery thereto belonging, and now used therewith, all which premises are now in the tenure or occupation of the said [*lessee*], (*except* and always reserved out of this demise unto the said [*lessors*], their heirs and assigns, free liberty of ingress, egress, and regress, for them the said [*lessors*], their heirs and assigns, at all seasonable times during the continuance of this demise, and their agents, workmen, and servants, with or without horses, carts, and carriages, into and upon and from the said demised premises, to fell, cut down, hew, saw, take, and carry away the timber and other trees, (except fruit trees), and all underwood, top-wood, willows, sallows, bushes, thorns, and quicksets whatsoever, now growing, or which may hereafter grow

Disclaimer of trust estate by one devisee.

Testatum.

Parcels.

Reservation of right of entry to cut timber.

OF A MILL AND FARM, PART FREEHOLD AND PART COPYHOLD.

upon the said lands hereby demised, except only such bushes and thorns as shall be requisite for repairing and amending the fences of or belonging to the said premises, and to plant, transplant, and nourish young trees and quicksets in the said fences, and to view the condition of the said demised premises, and to repair and lay materials there for the purpose of repairing the buildings thereupon, and for all other reasonable purposes whatsoever); To HAVE AND TO HOLD all such part and parts of the said premises, as is or are of freehold tenure, unto the said [*lessee*], his executors, administrators, and assigns, from the eleventh day of October last for the term of —— years, if the said [*testator's widow*] shall so long live, and in case the said [*testator's widow*] shall die in any year during the said term of —— years, and on any other day than the eleventh day of October, then To HAVE AND TO HOLD the said freehold premises from the day of the decease of the said [*testator's widow*], until the eleventh day of October then next ensuing; *And* To HAVE AND TO HOLD all such part and parts of the said demised premises as is or are of copyhold tenure, unto the said [*lessee*], his executors, administrators, and assigns, from the said eleventh day of October last, for the term of one whole year, and, at the expiration of such year, from year to year, until the expiration of the demise hereinbefore made of the said freehold premises, if the lord or lords, lady or ladies of the manor or manors whereof such copyhold hereditaments are parcel, shall consent thereto, and grant a licence for such demise of the said copyhold premises, and if the custom or customs of the said manor or manors will admit of the same without prejudice or forfeiture, then but not otherwise (*b*); YIELDING AND PAY-

Habendum as to freeholds.

Habendum as to copyholds.

Reddendum.

(*b*) From the terms of this *habendum* it is evident that the lease is made without the lord's licence. Where the lord's licence has been obtained, it is usual, though not necessary, shortly to recite it, or to refer to it in the *testatum* clause, thus:—

Where lease is made by virtue of a licence.

"in pursuance and by virtue of a licence from [A. B.], lord of the said manor of ——, bearing date the —— day of ——, the said [*lessor*] hath," &c.

As the licence is only operative (except to prevent forfeiture) to the exten-

ING for all the said premises yearly and every year during the continuance of this demise, unto the said [*lessors*], their heirs and assigns, the yearly rent or sum of £——, of lawful money of the United Kingdom, by equal half yearly payments, on the sixth day of April, and the eleventh day of October in every year, except the last half year's rent, which is hereby reserved and agreed to be paid on the first day of August next before the expiration of this demise (*c*); And also YIELDING AND PAYING,

OF A MILL AND FARM, PART FREEHOLD AND PART COPYHOLD.

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of the lord's interest, it is material to ascertain that his estate is at least co-extensive with the term proposed to be created, unless he be authorized to grant such licences by a power frequently introduced into settlements for that purpose.

(*c*) That rents may be made payable in advance, see 2 D. & E. 603; *Harrison* v. *Barry*, 7 Price, 690; and *ante*, Vol. 4, p. 351; and they are sometimes so payable by custom. *Buckly* v. *Taylor*, 2 D. & E. 600. By reserving the last half-year's rent, as in the precedent in the text, the landlord has the opportunity of distraining for it, while the lessee's property is or should be on the premises. For want of a power of this kind, the rent is sometimes lost, the lessor not being entitled to distrain, until the last minute of the day on which it becomes due, *i. e.* until midnight; *Duppa* v. *Mayo*, 1 Saund. 287; and then the rule which requires distresses to be made in the day-time, postpones the power of distress until the next day, by which time the goods are removed.

As to reserving rents in advance.

Formerly, a landlord's right of distress ceased at the expiration of the lease; but the stat. 8 Ann. c. 14, s. 6, 7, enabled him to distrain for six months afterwards, provided his title continued, and the distress were made during the tenant's possession; which possession, it has been decided, may be with the lessor's permission, and of part only of the demised lands. *Nuthall* v. *Staunton*, 6 Dow. & Ryl. 155. It has been held, that where, by the custom of the country, or by agreement, the tenant is entitled to the use of the barns for a certain period after the expiration of the lease, to house the last year's crop, the demise is to be considered as having continuance for this purpose during such occupation, and therefore that the crops are distrainable, though the lease has expired more than six months. *Beavan* v. *Delahay*, 1 H. Bl. 5. And the fact of the landlord having by injunction prevented the removal of the corn, does not vary the rule. *Knight* v. *Benett*, 3 Bing. 364.

Landlord may distrain after the expiration of demise.

Another clause in the statute of Anne just referred to (sect. 1,) gives to landlords an important right against execution-creditors, by providing that no goods shall be liable to be taken in execution, unless the party, at whose suit the same is sued out, shall, before the removal of the goods,

Landlord's claim to one year's rent out of proceeds of execution.

OF A MILL AND FARM, PART FREEHOLD AND PART COPYHOLD.

(*Reddendum for ploughing meadow, ut ante*, p. 4); the said several yearly rents to be respectively payable and

Stat. 8 Ann. c. 14.

pay to the landlord the rent due at the time of the taking, provided the arrears do not amount to more than *one year's rent;* and in case the arrears exceed one year's rent, then the party, paying one year's rent, may proceed to execute his judgment, and the sheriff is empowered and required to levy and pay to the plaintiff, as well the money so paid for rent as the execution-money. By sect. 8, it is provided that the act shall not prejudice the Crown. Upon this statute, the following points have been decided:—

Points decided upon the stat.

To what executions it extends.

1. That it extends to executions by *either* party, as well that of the defendant as the plaintiff, and therefore to an execution taken out by a defendant for the costs of a nonsuit; *Henchett* v. *Thompson*, 2 Wils. 140; but it is confined to executions on judgments, and was consequently lately held not to extend to a process issued from the Court of Pleas at Durham, by which the bishop authorizes the sheriff to deliver over the goods of a defendant to a writ of *pone per vadios*, (which had been forfeited to him (the bishop) by the non-appearance of the defendant at the return of the writ), in satisfaction of his damages, there being no previous judgment. *Brandling* v. *Barrington*, 6 Barn. & Cress. 467. But in an early case, where goods were seized under a *capias utlagatum* at the suit of a party, the Court of Exchequer, on motion, ordered that a year's rent should be paid to the landlord out of the monies in the hands of the sheriff. *Greaves* v. *D'Acastro*, Bunb. 194; see also *St. John's College* v. *Murcott*, 7 D. & E. 264. (The Court of Chancery recently ordered payment to a landlord of *two* years' rent out of the funds in Court under a sequestration. *Dixon* v. *Smith*, 1 Swanst. 457. This of course was independently of the statute).

As to under-tenants.

2. That the statute does not extend to the claim of a superior landlord, and therefore the ground landlord cannot claim a year's rent under an execution issued against an under-tenant. *Ex parte Bennet*, 2 Stra. 787.

Rent reserved in advance.

3. That rent stipulated by the lease to be paid in advance is rent within this statute. *Harrison* v. *Barry*, 7 Price, 690. The statute of course only applies, where the sum claimed is *rent*. In a late case, the question was, whether, A. having by articles contracted for the sale of certain premises to B., and to assign them on payment of the purchase-money, which agreement contained a stipulation, that, in the meantime, B. should pay and allow to A. "at the rate of 100*l. per annum* from the time of taking possession of the premises, until the completion of the purchase, in equal half-yearly payments," this annual payment was rent, so as to entitle the landlord to one year's amount against an execution-creditor; and it was decided in the affirmative. *Saunders* v. *Musgrove*, 5 Barn. & Cress. 524.

paid, free and clear from all present and future taxes, assessments, and payments whatsoever. *(Proviso for re-*

OF A MILL AND FARM, PART FREEHOLD AND PART COPYHOLD.

4. That trustees of attendant terms, mortgagees, and other persons claiming the rents as the legal owners of the immediate reversion, are entitled to the benefit of the statute. *Colyer* v. *Speer*, 2 Brod. & Bing. 67; *S. C.* 4 J. B. Moore, 473.

Trustees of terms, &c.

5. That where there are several executions, the landlord having received a year's rent on one, is not entitled to a year's rent on the other or others. *Dod* v. *Saxby*, 2 Stra. 1024.

Several executions.

6. That the landlord can only claim the rent due at the time of the seizure, and not that which accrues during the sheriff's possession; *Hoskins* v. *Knight*, 1 M. & S. 245; though the possession be long retained: or the property taken be of a nature not immediately removable, as growing corn. *Guillian* v. *Barker*, 1 Price, 277.

Rent to what period payable.

(Growing corn sold under an execution is not subsequently distrainable for rent, unless the vendee suffers it to remain on the ground an unreasonable time after it becomes ripe. *Peacock* v. *Purvis*, 5 J. B. Moore, 79*. This question seems to have been agitated, in consequence of some observations which fell from the learned Barons who decided *Guillian* v. *Barker*).

7. That the sheriff paying over the money to the person at whose suit the execution is levied, after notice, will be liable to an action on the case; *Colyer* v. *Speer*, 2 Brod. & Bing. 67; which may be brought by the landlord, or his personal representatives; *Palgrave* v. *Windham*, 1 Stra. 212; see *Waring* v. *Dewberry*, Ib. 97; (but not to an action *for money had and received*, *Green* v. *Austin*, 3 Campb. 259): and while the proceeds remain in his (the sheriff's) hands, the landlord may move the Court to order that the money be paid out of such proceeds. *Arnitt* v. *Garnett*, 3 Barn. & Ald. 440.

Landlord's remedy against sheriff.

8. That the sheriff is not bound to pay the year's rent without notice, *Waring* v. *Dewberry*, 1 Stra. 97; *Palgrave* v. *Windham*, Ib. 212; *Smith* v. *Russell*, 3 Taunt. 400; but notice before the sale, though after the removal of the goods, will be sufficient. *Arnitt* v. *Garnett*, 3 Barn. & Ald. 440. It is no answer to the landlord's claim, that the sheriff has left

Notice requisite.

* The stat. 11 Geo. 2, c. 19, s. 8, authorizes the landlord to distrain growing crops, and, when ripe, to lay the same up in the barns or other proper place on the premises; and if there should be no such place, then as near as may be, and in convenient time to sell and dispose of the same. Notice is to be given to the tenant, within one week, where the produce is lodged; and if the tenant tenders the rent and costs before the corn &c. is cut, it is to be delivered up.

As to landlord's right to distrain growing crops.

OF A MILL AND FARM, PART FREEHOLD AND PART COPYHOLD.

entry, ut ante, Vol. 4, p. 544). AND the said [*lessee*], for himself, his heirs, executors, administrators, and assigns,

goods on the premises sufficient to satisfy the rent. *Colyer* v. *Speer*, 2 Brod. & Bing. 67; *S. C.* 4 J. B. Moore, 473. No specific form of notice is necessary. Ib.

Sheriff's poundage.

9. That the sheriff is not entitled to poundage on the year's rent. *Gore* v. *Gofton*, 1 Stra. 643.

Sheriff how discharged.

10. The acceptance by the landlord of the undertaking of the sheriff's bailiff or auctioneer for the year's rent, has been held to discharge the sheriff. *Rotherey* v. *Wood*, 3 Campb. 24.

Consequence where execution fails.

11. That if the execution is bad, the landlord's claim to the rent out of the proceeds falls with it; and therefore, where an execution was levied after an act of bankruptcy, and a commission followed within two months, the assignees were held to be entitled to recover from the sheriff not only the amount levied under the execution, but the year's rent, which he had paid over to the landlord. It is material, however, to observe, that the Court laid much stress on the fact, *that the payment was made before notice of the commission*. *Lee* v. *Lopes*, 15 East, 230.

(The notion that bankruptcy was an execution within the statute, has long been exploded. *Ex parte Plummer*, 1 Atk. 103, and see 15 East, 232. As to its effect upon the landlord's right of distress *now*, *vide ante*, Vol. 4, p. 563).

Exception as to extents, embraces extents *in aid*.

12. That the exception in the statute in favour of extents from the Crown applies also to extents *in aid*. *Rex* v. *De Caux*, 2 Price, 17; see also *Rex* v. *Hill*, 6 Price, 19. And if an extent be issued after a distress made by the landlord, but before the expiration of the five days allowed for sale, even though it be not levied, the extent will take precedence of the distress, the goods being, by the act of distraining, merely placed in the custody of the law, and the property in them not changed; whereas an extent binds the property from the *teste*. *Rex* v. *Cotton*, 2 Ves. Senr. 288; see also *Rex* v. *Hodder*, 4 Price, 313. (These cases are stated in Com. *Land. & Ten.* 342). The landlord, too, has no claim to be paid out of the property extended for the rent accruing since the seizure; but if the sheriff remain in possession an undue length of time, his remedy is by action on the case against him. *Rex* v. *Hill*, 6 Price, 19.

There must be a subsisting tenancy.

13. That the statute only applies where there is an existing tenancy; and therefore, where, subsequently to a *fieri facias* being levied, the landlord recovered the possession by virtue of a writ of *hab. fac. pos. under a demise laid prior to the issuing of the fi. fa.*, it was held, that, as the tenant was a trespasser from that period, the landlord was not entitled to a y ar's rent. *Hodgson* v. *Gascoigne*, 5 Barn. & Ald. 88. On the same

doth hereby covenant with the said [*lessors*], their heirs and assigns, in manner following, that is to say, (*to pay rents*

OF A MILL AND FARM, PART FREEHOLD AND PART COPYHOLD.

ground, namely, that the tenant was a wrong-doer, and not, in the proper sense of the word, a tenant, it was held that the sheriff could not take the growing crop, under the execution, as his property.

Lastly, that the statute does not apply where the execution is taken out by the landlord himself. *Taylor* v. *Lanyon*, 4 Moo. & Pay. 316.

Stat. 56 Geo. 3, c. 50.

The rights of execution-creditors against farming tenants have undergone some modification by the provisions of a recent statute, which was passed for the benefit of agriculture, and enacts, "that no sheriff or other officer in England or Wales shall, by virtue of any process, carry off, or sell for the purpose of being carried off, from any lands let to farm, any straw, threshed or unthreshed, or any straw of crops growing, or any chaff, colder, or any turnips, or any manure, compost, ashes, or sea-weed, in any case whatsoever, nor any hay, grass, or grasses, whether natural or artificial, nor any tares or vetches, nor any roots or vegetables, being produce of such lands, in any case where, according to any covenant or written agreement, entered into for the benefit of the landlord of any farm, such hay, &c., ought to be used or expended thereon, and of which such sheriff shall have received a written notice, before he shall have proceeded to sale."

No sheriff to sell or carry off from lands let to farm, any straw, chaff, or turnips *in any case*.

Nor any hay, grass, tares, or roots, contrary to covenant.

By sect. 2, the tenant is, on having knowledge of such process, to give a written notice to the sheriff of such agreement, and also of the name and residence of the landlord; and the sheriff is forthwith to send a notice by the General Post to the landlord, in all cases where such landlord shall be resident in any part of this United Kingdom, and shall have been ascertained by him; and also to the known steward or agent of such landlord, stating the fact of possession having been taken; and the sheriff is in all cases of the absence or silence of such landlord, &c., to postpone the sale until the latest day he lawfully can.

Tenant to give written notice to sheriff, of the covenants and of the residence of landlord.

And sheriff to give notice to landlord of the process.

Sect. 3, provides, that the sheriff may dispose of the crops to any person who shall agree in writing with him, in cases where no written agreement shall be shewn, to use and expend the same on such lands, according to the custom of the country; and in cases where any written agreement shall be shewn, then according to such written agreement; and after such sale, it shall be lawful for such person to use all such necessary barns, stables, buildings, outhouses, yards, and fields, for the purpose of consuming such crops as the sheriff shall assign, and which the tenant would have been entitled to for the like purpose.

Sheriff may dispose of crops to any person agreeing to expend them upon the land, according to the covenant, or, if none, according to the custom of the country.

And purchaser may use barns, &c.

By sect. 4, the sheriff is, on the request of any landlord who shall be aggrieved by any breach of such agreement, to permit him to bring any

Sheriff to per-

OF A MILL AND FARM, PART FREEHOLD AND PART COPYHOLD.

and taxes, ut ante, Vol. 4, p. 544). *And also*, that he the said [*lessee*], his executors, administrators, or assigns, will, from time to time during the continuance of this demise, at his or their own costs and charges, repair, support, maintain, and keep the said messuage, barns, stables, and other out-buildings belonging to the said premises, and all the glass-windows and lead-work thereof, doors, shelves, shutters, fixtures, locks, keys, bolts, bars, and

To repair messuage and buildings.

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mit landlord to sue in his name.

action in his name, he having previously indemnified the sheriff against costs, &c.

Sheriff, before sale, to inquire as to name and residence of landlord.

By sect. 5, the sheriff is, before sale, to make due inquiry within the parish, as to the name and residence of the landlord.

Landlord not to distrain on crops severed from the soil, and sold subject to the agreement;

Sect. 6. Where any purchaser of any crop shall have entered into any agreement with the sheriff, touching the use and expenditure thereof, it shall not be lawful for the landlord to distrain for any rent on any corn, hay, straw, or other produce, which, at the time of such sale, and the execution of such agreement, shall have been severed from the soil, and sold, subject to such agreement, by the sheriff; nor on any turnips, whether drawn or growing, if sold according to the provisions of this act; nor on any horses, sheep, or other cattle, nor on any beast whatsoever, nor on any implements of husbandry, which any person shall employ for the purpose of threshing out, carrying, or consuming any such corn, &c. under the provisions of the act, and the agreement to be entered into between the sheriff and the purchaser.

Nor on the cattle or implements of husbandry.

Clover growing under standing corn, not to be sold.

Sect. 7. No sheriff is by virtue of any process to sell any clover, rye-grass, or any artificial grasses, which shall be newly sown, and be growing under any crop of standing corn.

Act not to extend to straw &c., which tenant may remove.

Sect. 8. Act not to extend to any straw, turnips, or other articles, which the tenant may remove consistently with some contract in writing.

No damages to be recovered against sheriff, unless for wilful breach.

Sect. 9. No damages to be recovered against the sheriff, for any breach of the provisions of this act, unless such breach was wilful.

No person to be a trespasser by any thing done in pursuance of agreement.

Sect. 10. No sheriff or under-sheriff &c., nor any purchaser, to be deemed to be a trespasser, by reason of his, her, or their possession of any barns, &c. for the purpose of threshing out or consuming such produce, or for doing any thing necessary for carrying into effect all stipulations contained in any agreement, though done after the return of the process.

No assignee of bankrupt, &c. to use or dispose of produce otherwise than as bankrupt, &c. could have done.

Sect. 11. No assignee of any bankrupt or insolvent, nor under any bill of sale, nor any purchaser of stock, &c. on any lands let to farm, shall take, use, or dispose of any produce, or any manure, or other dressings intended for such lands, and being thereon, in any other manner than such bankrupt &c. ought to have taken &c. the same.

other fastenings, racks and mangers, of or belonging to the said messuage, barns, stables, and other out-buildings, and the pump, and the going gear thereof, and the gates, gate-posts, and irons, pales, rails, hedges, ditches, drains, water-courses, and fences, belonging to the said premises; *And also* the said water-mill, and the mill-dam, mill-pool, inlets, outlets, water-courses, waste water or sluice-gates, staples, brick-work, terrass, brasses, irons, wood-works, and other works, bins, tackle, materials, utensils, implements, stones, machinery, and going gear to the said water-mill belonging, in good, substantial, and tenantable repair, order, and condition; and in such repair, order, and condition, shall and will leave, and deliver up the same respectively to the said [*lessors*], their heirs or assigns, at the expiration or other sooner determination of this demise; the said messuage, water-mill, and other buildings, being first put into good and tenantable repair and condition by the said [*lessors*], their heirs or assigns: and the said [*lessee*], his executors, administrators, or assigns being allowed by the said [*lessors*], their heirs or assigns, on request, rough timber, terrass, mortar, bricks, lime, stones, and tiles, and all other materials, except glass and solder and lead for the windows, which shall be necessary for such repairs; *And also* that the said [*lessee*], his executors, administrators, or assigns will, yearly and every year, during the continuance of this demise, cause all the water-courses and drains belonging to any of the meadow or pasture-grounds hereby demised, to be drawn, opened, and cleaned, at such times, and by such persons, as they the said [*lessors*], their heirs or assigns, shall appoint; *And also (covenants as to course of husbandry).* And the said [*lessors*] do hereby jointly, for themselves, their heirs, executors, administrators, and assigns (*d*), and each of them severally doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said [*lessee*], his exe-

OF A MILL AND FARM, PART FREEHOLD AND PART COPYHOLD.

And water-mill, with machinery, &c.

To clear the drains.

Covenants by lessors.

(*d*) If the covenant is to be several and confined to the acts of the respective covenanting parties, the terms will be,

"And each of them, the said [*lessors*], separately, and in

OF A MILL AND FARM, PART FREEHOLD AND PART COPYHOLD.

cutors, administrators, and assigns, in manner following, that is to say, (*ut ante*, Vol. 4, pp. 550, 551); *And also*, (*for quiet enjoyment, ut ante*, p. 14); *And lastly*, that they the said [*lessors*], their heirs or assigns, will, at the end of the said term of one year, for which the said copyhold premises are hereinbefore demised, at the request and costs of the said [*lessee*], his executors, administrators, or assigns, make and execute to the said [*lessee*], his executors, administrators, or assigns, a new lease of the said copyhold premises for one year more, and so on, at the end of every year during the continuance of the demise hereby made of the said freehold premises, will execute a new lease of the said copyhold premises for one year only, so and in such manner that the said freehold and copyhold premises may be held together during the term for which the said freehold hereditaments are to be held as aforesaid, and with, under, and subject to the same rent, covenants, and conditions as are hereinbefore contained (*e*). IN WITNESS, &c.

Covenant at the end of each year, to grant a lease of copyholds.

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respect only of his own acts and defaults, doth hereby for himself, his heirs, executors, administrators, and assigns," &c.

Where there is a joint demise, it is more correct to make the covenants joint.

As to demises by copyholders without a licence.

(*e*) It is clear that a demise of copyholds, in the terms of this lease, does not create a forfeiture, inasmuch as it only operates as a lease for one year, unless the further term specified is warranted by licence, or by special custom. See *Lufkin* v. *Nunn*, 11 Ves. 170. And it has been decided, that a covenant that the lessee *shall enjoy* is equally inoperative as a demise, and therefore to produce forfeiture; Lady *Montague's* case, Cro. Jac. 301; *Lenthall* v. *Thomas*, 2 Keb. 267; (but see *Richards* v. *Seley*, 2 Mod. 79); *Doe* d. *Nunn* v. *Lufkin*, 4 East, 221; for though expressions of this nature have sometimes been held to amount to actual demises, (*vide ante*, Vol. 4, p. 332), yet the Courts are disinclined to give this construction to them where the effect would be to cause a forfeiture; see *Doe* d. *Coore* v. *Clare*, 2 D. & E. 739; and especially where the lease contains a formal and technical demise, shewing thereby that the parties had in view the distinction between demise and covenant. In *Lufkin* v. *Nunn*, 1 New Rep. 163; *S. C.* 11 Ves. 170, a copyholder, tenant for life, demis-

ed lands for one year, and at the end of such year for thirteen years more, if the lord of the manor should give licence, and covenanted with the lessee for quiet enjoyment "during the term aforesaid," against him ro the persons entitled to the reversion, or any person claiming by her or their means, consent, or procurement. The lessor sold her interest in the premises, and the grantee brought an ejectment against the tenant, upon which the latter filed a bill to restrain proceedings at law. On a case from Chancery the Court of Common Pleas certified—*first*, that an ejectment might be brought after the expiration of the year;—and *secondly*, that if the tenant should be evicted, no action would lie on the covenant for quiet enjoyment: And Lord *Eldon* held, that the lessee had no claim to equitable relief.

OF A MILL AND FARM, PART FREEHOLD AND PART COPYHOLD.

In this case, it will be observed, there was no covenant to grant a new lease.

Where the lessor covenants, as in the precedent in the text, to grant a new lease at the expiration of the term for which the demise is made, and so from time to time during a given period, it is clear that the covenant affords no defence to an ejectment; *Fenney* d. *Eastham* v. *Child*, 2 Mau. & Selw. 255; it being now completely settled (in opposition to a doctrine once broached by Lord *Mansfield*), that an equitable claim cannot be set up at law against the legal title. *Doe* d. *Hodsden* v. *Staple*, 2 D. &. E. 684.

As to covenants to grant new leases of copyholds from time to time.

The lessee's only remedy would be either an action for damages for breach of covenant, or a suit in Equity to enforce the specific performance of the covenant. As to the construction of the covenant to renew in such cases, see *Rawstorne* v. *Bentley*, 4 B. C. C. 415, stated *ante*, Vol. 4, p. 376.

OF A PUBLIC-HOUSE, BY OWNER AND TRUSTEES OF A TERM.

LEASE *of a* PUBLIC-HOUSE *to two Persons, by the* OWNER *of the* INHERITANCE, *and the* TRUSTEES *of a* TERM, *(subject to Cesser), with the* CONSENT *of a* PERSON *to whom the* LEASE *was originally* CONTRACTED *to be* GRANTED. SPECIAL REDDENDUM *to* TERMORS UNTIL *the* CESSER *of the Term, and then to the* OWNER *of the* INHERITANCE. RENT *to be paid to* OWNER *until* NOTICE. USUAL COVENANTS *by* LESSEES *to* PAY RENT, *make Repairs,* NOT *to* CARRY *on* OFFENSIVE TRADES, *&c. also to* CONDUCT *the* HOUSE *in an* ORDERLY MANNER, *and annually* RENEW *the* LICENCE. COVENANT *by* OWNER *for quiet* ENJOYMENT, *and to* PAY TAXES, *(exclusive or inclusive of improved Value), and* ALLOW LESSEE *to* DEDUCT *them out of the* RENT.

Parties: owner, first; trustees of one hundred years term, second; contractor for lease, third;

and lessees, fourth.

Testatum.

In pursuance of previous agreement, trustees, by direction of owner and contractor for lease,

THIS INDENTURE, &c., BETWEEN [*owner*], of &c., of the first part; [*two trustees*], of &c., (who are trustees of a term of one hundred years, created by indenture dated the —— day of ——, of and in (among others) the hereditaments hereinafter described), of the second part; [*contractor for lease*], of &c., of the third part; and [*two lessees*], of &c., of the fourth part; WITNESSETH, that in pursuance and performance of certain articles of agreement, bearing date the —— day of ——, made between the said [*owner*] and [*one of the trustees*], of the one part, and the said [*contractor for lease*], of the other part; and in consideration of the rent hereinafter reserved, and of the covenants, conditions, and agreements hereinafter contained, on the part of the said [*two lessees*], their executors, administrators, and assigns, to be performed; *They* the said [*two trustees*], at the request, and by the direc-

OF A PUBLIC-HOUSE, BY OWNER AND TRUSTEES OF A TERM.

tion as well of the said [*owner*] as of the said [*contractor for lease*] (*a*), (testified by their severally executing these presents), and so far as they respectively lawfully may or can, but no further or otherwise, *Have*, and each of them *Hath* demised, leased, and to farm let, and by these presents *Do*, and each of them *Doth* demise, &c.; AND the said [*owner*] *Hath* granted, demised, and confirmed, and by these presents *Doth* grant &c., unto the said [*two lessees*], their executors, administrators, and assigns, ALL THAT &c., *(Parcels)*; TO HAVE AND TO HOLD the said premises hereinbefore demised, with their and every of their appurtenances, unto the said [*two lessees*], their executors, administrators, and assigns, as tenants in common, from the twenty-fourth day of June, 18—, for the term of thirty-one years thence next ensuing; YIELDING AND PAYING therefore yearly and every year during the said term hereby granted, unto the said [*two trustees*], as trustees as aforesaid, their executors, administrators, and assigns, during so long and such period of the said term hereby granted as the said term of one hundred years now vested in them the said [*two trustees*] as aforesaid shall subsist and continue; And from and immediately after the cesser or determination thereof (*b*), *Then* YIELDING AND PAYING unto the said [*owner*], his heirs, and assigns, dur-

Demise;

And owner confirms, &c.

Parcels.

Habendum for thirty-one years.

Reddendum to trustees during the continuance of their term.

Reddendum to owner during the residue of term.

(*a*) If any consideration passed from the present lessees to the person with whom the agreement for the lease was entered into, such consideration, it has been decided, need not be stated in the lease. *Vide ante*, Vol. 4, p. 401.

Form of leases in which termors join with the owner of the inheritance.

(*b*) The present lease, it will be perceived, differs from that by a mortgagee for a term and the owner of the equity of redemption (*ut ante*, Vol. 4, p. 561), in this, that the term is liable to cesser, on the failure or performance of the purposes for which it was created, (as to secure a jointure &c.), and therefore may determine before the expiration of the lease. The same observation, however, would apply to a mortgage term before it has become absolute, such term being, it is well known, determined by repayment of the money on the day fixed by the proviso for redemption, but which is rarely done. For the sake of accuracy, the present form of *reddendum* and covenants might be used in such a case; but if the term has become absolute, the *reddendum* will be simply to the mortgagee, with a

OF A PUBLIC-HOUSE, BY OWNER AND TRUSTEES OF A TERM.

ing the then residue of the said term hereby granted, the annual rent or sum of ninety-four pounds of lawful money of Great Britain, to be paid by four equal quarterly payments, on the twenty-fifth day of March, the twenty-fourth day of June, the twenty-ninth day of September, and the twenty-fifth day of December, in every year, the first quarterly payment to be made on the twenty-fifth day of March next ensuing. PROVIDED ALWAYS, *and it is hereby*

Rent to be paid to owner until notice from the trustees.

proviso for the payment of the rent to the owner of the equity of redemption, until notice, *ut ante*, Vol. 4, p. 562.

As to giving mortgagors a power to lease.

In mortgages, powers to lease are sometimes very usefully given to the *mortgagors* while in possession, as they cannot, without the concurrence of the mortgagees, make such leases, which concurrence they are often unwilling to apply for, on account of its leading to a disclosure of the security to the lessee; and yet no mortgagor, unless he be expressly empowered to do so, can honestly attempt to grant a lease, without the junction of the mortgagee. This state of things is also inconvenient to the mortgagee, who cannot, we have seen, become entitled to the rent, or have the benefit of *the covenants of* a lease, so granted. (*Vide ante*, Vol. 4, p. 350). If there be a power to lease given to him (the mortgagor), it would be unnecessary, in exercising such power, to refer to the mortgage or the power, and the *reddendum* and covenants, though made to and with the mortgagor and his heirs, would, it is conceived, enure to the use of the mortgagee, when he chose to avail himself of them, by giving notice to the tenant to pay the rents to him. (As to this principle *vide ante*, Vol. 4, pp. 349, 385).

Leases from mortgagors to mortgagees.

Here it may be observed that leases granted by mortgagors to mortgagees, which are sometimes made, are regarded in equity with suspicion, as tending, if the lease be beneficial, to usury, by giving something to the mortgageee *ultra* his principal and interest, and as springing from that influence which the mortgagee's situation is supposed to give him over the other contracting party, whose necessities often place him under a disadvantage in any such dealing with his mortgage creditor. *Gibbons* v. *Creed*, 2 Sch. & Lef. 212; *Webb* v. *Rocke*, Ib. 661. See also *Hickes* v. *Cooke*, 4 Dow, 24, 26. It behoves, therefore, a person taking a lease under such circumstances, to be prepared with proof of the *bona fides* of the transaction. If no unfair advantage has been taken, and an adequate rent is reserved, the lease is clearly unimpeachable on either of the grounds suggested. (As to loans made by lessees, contemporaneously with the granting of the lease, or, as it is familiarly termed in Ireland, lease and loan, see *Prior* v. *Dumphy*, 1 Ball & Beatty, 27; and *O'Brien* v. *Grierson*, 2 Ib. 323).

OF A PUBLIC-HOUSE, BY OWNER AND TRUSTEES OF A TERM.

agreed and declared between and by the said parties hereto, that notwithstanding the reservation hereinbefore contained, the said rent shall henceforth be paid and payable unto the said [*owner*], his heirs or assigns, until such time as they the said [*two trustees*], their executors, administrators, or assigns, shall require to have the receipt of the rents and profits of the said hereby demised premises, under or by virtue of the aforesaid term of one hundred years; *And* shall give or leave notice in writing at the said hereby demised premises, requiring the said [*two lessees*], their executors, administrators, or assigns, to pay the said rent to them the said [*two trustees*], their executors, administrators, or assigns; *And* that, until such notice shall be given as aforesaid, the receipt or receipts of the said [*owner*], his heirs, or assigns, shall be a good and sufficient discharge, or good and sufficient discharges for the same, to the said [*two lessees*], their executors, administrators, or assigns. AND THE SAID [*two lessees*], for themselves, their heirs, executors, administrators, and assigns, *Do*, and each of them for himself and herself, his and her heirs, executors, administrators, and assigns (*c*), *Doth* hereby covenant and agree with the said [*owner*], his heirs, and assigns, and also separately with the said [*trustees*], their executors, administrators, and assigns, that they the said [*two lessees*], or one of them, their, or one of their executors, administrators, or assigns, will, from time to time during the

Covenant to pay the rent.

(*c*) Leases granted to several persons are generally made to them as tenants in common, in order that each may take a share transmissible to his representatives, excluding survivorship; but if the lessees are partners in trade, and the lease form part of their stock, there is no survivorship in equity, but the survivor (who takes the whole at law) is a trustee for the representatives of the deceased lessee, in respect of the share of such deceased partner, or, to speak more accurately, the lease, constituting part of the partnership assets, must be accounted for accordingly. Where the lessees take the legal and beneficial interest, as joint tenants, it should seem that the covenants entered into by them ought to be joint and not several, otherwise, on the death of one, his representatives will be bound by the covenants, though they take no beneficial interest, the property surviving to the other. *Enys* v. *Donnithorne*, 2 Burr. 1190.

As to lessees being tenants in common, or joint tenants.

OF A PUBLIC-HOUSE, BY OWNER AND TRUSTEES OF A TERM.

said term of thirty-one years, duly pay, or cause to be paid, the said yearly rent or sum of ninety-four pounds, at the days or times and in the manner hereinbefore appointed for payment thereof, without any deduction or abatement thereout, except as hereinafter mentioned; AND ALSO, that they the said [*two lessees*], or one of them, their, or one of their executors, administrators, or assigns, will, from time to time during the said term, at their own costs, sufficiently repair, amend, scour, cleanse, paint, glaze, pave, and maintain the said premises hereby demised, and all erections and buildings whatsoever, which, during the same term, shall be erected or built upon the said premises, or any part thereof; and the same premises, erections, and buildings so being in all things well and sufficiently repaired, amended, scoured, cleansed, painted, glazed, paved, and maintained, shall and will, at the end or other sooner determination of the same term, peaceably and quietly yield up unto the person or persons who shall then be entitled to the said premises, expectant upon the determination of this demise; *Together* with all and singular doors, locks, keys, bars, bolts, chimney-pieces, wainscots, windows, window-shutters, partitions, dressers, shelves, pumps, water-pipes, pavements, pales, rails, and all other articles and things, usually accounted or esteemed as fixtures, which now are, or at any time during the said term of thirty-one years shall be fixed, fastened, or put up, in or about the said demised premises, or any part or parts thereof, (damage to be occasioned by fire only excepted): AND FURTHER, that it shall be lawful for the said [*two trustees*], their executors, administrators, and assigns, and also for the said [*owner*], his heirs, and assigns, and for his or their servants, agents, or workmen, twice, or oftener, in every year during the said term of thirty-one years hereby granted, (giving to the said [*lessees*], their executors, administrators, or assigns, three days' previous notice of his or their intention so to do), to enter and come at seasonable hours in the day-time into and upon the said demised premises, and every or any part thereof, with the appurtenances, to search and inspect the condition of the repairs thereof; *And* of all defects, decays, or wants of reparation, which shall be

To repair.

And leave premises repaired.

Together with the fixtures, &c.

That lessor may enter to view the repairs.

so found, to give or leave notice in writing at or upon the said demised premises, or any part thereof, for the said [*two lessees*], their executors, administrators, or assigns, to repair and amend the same; AND they the said [*two lessees*], or one of them, their or one of their executors, administrators, or assigns, shall and will, within three calendar months after every such notice shall have been so given or left as aforesaid, well and sufficiently repair, amend, and make good all the defects, decays, and wants of reparation expressed in such notice, (except damage by fire): AND FURTHER, that they the said [*two lessees*], their executors, administrators, or assigns, will, during all the said term, use and occupy, or cause to be used and occupied, the said messuage or tenement as or for an inn or public-house; and shall and will keep and conduct the same in a proper and orderly manner, so as to afford no just or reasonable ground for the withdrawing or withholding of all or any of the licences for the sale of beer and ale and wine and spirituous liquors therein, as heretofore used and accustomed; and will from time to time apply for and do or cause to be done what shall be requisite for obtaining the renewal of such licence or licences (*d*); AND FURTHER, that they the said [*two les-*

OF A PUBLIC-HOUSE, BY OWNER AND TRUSTEES OF A TERM.

To use the premises as a public-house.

Not to exercise certain trades.

(*d*) Sometimes, in the lease of a public-house, is added a covenant by the lessee to purchase liquors of the lessor, *ut ante*, Vol. 4, p. 460. It has been held that the lessee is only bound by a covenant of this nature to purchase so long as the liquors are of a good marketable quality. *Holcombe* v. *Hewson*, 2 Camp. 391. And it was lately decided to be a sufficient answer to a claim to advanced rent, under a proviso that, if lessee did not purchase beer of the lessor, his rent should be advanced, that the beer was bad, nauseous, and unwholesome. *Cooper* v. *Twibill*, 3 Camp. 286, n. If it be expressed that the covenant shall only be binding in case the beer furnished be good, it should be specifically stated whether any one instance of failure on the part of the lessor is to discharge the lessee *in toto* from his contract, or whether he is only entitled to resort to third persons, after every particular instance in which the lessor has failed to execute his order. If the latter be the construction, the lessee is in a better situation without the express qualification than with it. This remark is suggested by a late case, where the lessee of a public-house covenanted

As to covenant by publican-lessee to purchase liquors of lessor.

OF A PUBLIC-HOUSE, BY OWNER AND TRUSTEES OF A TERM.

sees], their executors, administrators, or assigns, shall not nor will, at any time or times during the said term of thirty-one years, use, exercise, or carry on, or permit to be used, exercised, or carried on, in or upon the said demised premises, or any part thereof, the trade, business, or occupation of a slaughterman, butcher, tripe-dealer, tobacco-pipe-burner, dyer, distiller, melter of tallow, tallow-chandler, soap-maker, sugar-baker, felt-monger, ink-maker, farrier, blacksmith, coppersmith, scavenger, dustman, or night-man, or any other noisome or offensive trade or business whatsoever (*e*); PROVIDED ALWAYS,

Clause of re-entry.

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to buy of the lessor all the malt he should use on the premises, and the lessor covenanted to deliver to him, on request, a sufficient quantity of good marketable malt at a market price, and if he should neglect so to do, the lessee might purchase the same of any other person. In an action by the lessor against the lessee for using malt not bought of him, the defendant alleged, that, for a long time after making the indenture, the plaintiff neglected to deliver to the defendant a sufficient quantity of good marketable malt; but, instead thereof, delivered divers quantities of bad malt; by reason whereof the defendant was in great danger of losing the custom of many persons, and thereupon the defendant bought malt of other persons. The plaintiff demurred. The Court held the plea to be ill; *Gibbs*, C. J., observing, that it did not sufficiently connect the malt purchased with the order given to the plaintiff, so as to excuse the defendant for buying of others. The defendant ought to have stated that *he did give particular orders to the plaintiff, and, on his breach of duly executing them, he bought particular quantities of others.* To hold the plea to be sufficient, would be, he said, to decide that a single breach by the lessor would release the covenant of the lessee. From the observations that fell from two of the learned Judges, (*Chambre* and *Dallas*), it should seem that they considered that it was an absolute covenant on the part of the lessee to buy malt of the lessor, without regard to its quality, and that his remedy, in case the quality was bad, was an action on the covenant of the latter*. *Weaver* v. *Sessions*, 6 Taunt. 154.

Delay to take advantage of a forfeiture no waiver.

(*e*) In a late case, where there was a proviso for re-entry if the lessee exercised certain trades, it was contended that the lessor, by permitting

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* But does not this construction render the clause authorizing the lessee to purchase malt of other persons absolutely nugatory?

[and these presents are upon this express condition, and it is hereby declared and agreed by and between the

OF A PUBLIC-HOUSE BY OWNER AND TRUSTEES OF A TERM.

the conversion of the premises into a shop for one of the prohibited trades, (the act having taken place under his own immediate observation, as he lived next door), and having been acquiescent for six years, had waived the forfeiture: but the Court held, that this delay had no such effect, unless the lessee had been suffered to make improvements, (which, it was said, might have afforded a strong ground, not merely for equitable relief, but for a Jury to imply the lessor's assent); or there had been some positive act amounting to a waiver of the forfeiture, as the receipt of rent. *Doe* d. *Sheppard* v. *Allen*, 3 Taunt. 78. And in another case, (*Macher* v. The *Foundling Hospital*, 1 Ves. & Bea. 188), Lord *Eldon* was of opinion, that the lessor's permission, express or constructive, to the lessee to carry on a particular trade, prohibited by the condition, was not to be construed as a general licence to use the premises for *any* trade; and we may collect from his Lordship's observations, that he did not consider the principle of *Dumpor's* case (stated *ante*, Vol. 4, p. 55) applied to these cases, so as to make a licence to carry on a particular trade operate as a dispensation with the condition as to other trades; but the question was not raised in the principal case, as no licence in writing, as required by the condition had been given, but acts denoting acquiescence were alleged to have been done by the lessors; which acts, it is clear, even by the rule in *Dumpor's* case, would not have extinguished the condition. *Vide ante*, Vol. 4, p. 367. The case of *Macher* v. *Foundling Hospital* appears to have been settled by compromise, so that nothing was *decided* by it. If a licence to carry on a particular trade be held not to discharge the condition as to other trades, the doctrine must be founded on the hypothesis, that the clause amounts to a separate condition in regard to each particular trade, for it is now too late to contend that a condition can be partially dispensed with. Until the point has received an adjudication, it will be prudent not to rely upon it. In this, as well as in the case of a licence to assign, if it be wished that the lessor's assent shall be given *pro hâc vice*, without destroying the condition, this scheme may sometimes be effected by making him notify his acquiescence by the acceptance of rent, which will, as already observed, have the effect of waiving the forfeiture without dispensing with the condition in regard to future acts. *Vide ante*, Vol. 4, p. 367. Where a licence is given, a defeazance to revive the condition (*ut ante*, Vol. 4, p. 60) should be executed by the lessee or his assignee.

Whether licence to carry on a particular trade operates as a general licence, and dispenses with the condition.

If the lease be of a private house, and it is intended wholly to restrain the use of it as a shop, or as a public auction-room, instead of the above covenant, add—

OF A PUBLIC-HOUSE, BY OWNER AND TRUSTEES OF A TERM.

said parties to these presents], That, if at any time or times during the said term, the said yearly rent of ninety-four pounds, or any part thereof, shall be in arrear and unpaid for the space of twenty-one days next after any of the said days hereinbefore appointed for payment thereof, (being first lawfully demanded at the expiration of the said twenty-one days, or at any time afterwards, and not paid when demanded); *or* if the said [*two lessees*], their executors, administrators, or assigns, or any of them, shall make default in performing or keeping all or any of the covenants, conditions, or agreements hereinbefore contained, on their parts to be performed or kept, *Then*, and in every such case, it shall be lawful for the said [*owner*], his heirs, or assigns, or the said [*two trustees*], their executors, administrators, or assigns, into or upon the said demised premises, or any part thereof in the name of the whole, to re-enter, and the same to have again, repossess, and enjoy, as in his or their former estate or estates; [and the said [*two lessees*], their executors, administrators, and assigns, and all other tenants or occupiers of the said premises or any part thereof, wholly to expel and eject, any thing hereinbefore contained to the contrary thereof notwithstanding]. AND THE SAID [*owner*], for himself, his heirs, executors, administrators, and assigns, doth hereby covenant with the said [*two lessees*], their executors, administrators, and assigns, that they the said [*two lessees*] respectively, and

Covenant by owner for quiet enjoyment.

Covenant not to use premises as a shop or auction-room.

"Shall not nor will convert or use, or suffer to be converted or used, the said messuage or dwelling-house, or any part thereof, into or as a shop or place of public or open sale, of or for any goods, wares, merchandise, or commodities whatsoever, nor permit any public sale or auction to be made in or upon the said demised premises, or any part thereof (other than for the sale of the household goods, furniture, and effects of the said [*lessee*], his executors, administrators, or assigns, used by him, her, or them, in the said messuage or dwelling-house)."

If it be intended to restrain *any* auction upon the premises, then for the words "other than" in the parenthesis, substitute "either," and add at the end, "or otherwise."

OF A PUBLIC-HOUSE, BY OWNER AND TRUSTEES OF A TERM.

their respective executors, administrators, and assigns, duly paying the said rent of ninety-four pounds hereinbefore reserved, and performing all and singular the covenants and conditions hereinbefore contained on their parts to be performed, shall peaceably hold, possess, and enjoy all the said premises hereby demised, during the said term of thirty-one years, without any hinderance or interruption by him the said [*owner*], or any person or persons lawfully claiming or to claim through or under him; And further, that he the said [*owner*], his heirs or assigns, will, from time to time during the term hereby granted, pay and discharge all taxes, rates, assessments, and impositions whatsoever, which now are, or hereafter during the said term shall be imposed upon or payable in respect of the said premises hereby demised, or any part thereof (*f*), or will from time to time permit the said [*lessees*], their executors, administrators, or as-

To pay taxes.

Or permit lessee to deduct them out of rent.

(*f*) If it be intended that the lessor's covenant shall extend to taxes payable on the improved value of the premises, add—

"including the taxes, rates, and assessments which shall or may become payable, by reason of the improved or increased value of the said premises, over and above the said rent hereby reserved*."

Including taxes in respect of improved value.

If these words are added, the proviso in the text will, of course, be omitted.

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* We have seen that acovenant by the lessor to pay the land-tax is confined to that portion of the tax which is payable in respect of the rent, exclusive of the improved value; (*vide ante*, Vol. 4, p. 382); and the same principle was lately held to apply, where, in a lease which contained a covenant by the lessee not to build without the licence of the lessor, the lessor covenanted to pay *all* taxes *charged or to be charged* upon or in respect of the demised ground during the term; and the lessee having, in pursuance of a licence from the lessor, which was given at the time of the execution of the lease, built upon, and thereby improved the annual value of the property, it was held that the lessor was not bound, under his covenant, to pay the poor's and paving rates, &c. for the improved value, but only his proportion, according to his rent. *Watson* v. *Home*, 7 Barn. & Cress. 285.

Covenant by lessor to pay taxes, not extended to taxes payable for the improved value.

OF A PUBLIC-HOUSE, BY OWNER AND TRUSTEES OF A TERM.

signs, to deduct and retain the same out of the rent hereinbefore reserved, when and as the same shall become due, whether such taxes, rates, or assessments shall have accrued or become payable within the same period as the rent for the time being remaining unpaid or not (*g*), they the said [*lessees*], their executors, administrators, or assigns, at the time of claiming the said deduction, producing proper receipts or vouchers as evidence of the payment of the said taxes, rates, and assessments; [PROVIDED always, that if the premises hereby demised shall be rated or assessed at a higher rate or value than the said rent hereinbefore reserved, this present covenant shall not oblige the said [*lessor*], his heirs, executors, administrators, or assigns, to pay a larger proportion of the said taxes, rates, and assessments, now payable or hereafter to become payable in respect of the said demised premises, than the rent hereby reserved shall bear to the whole value of the said premises]. IN WITNESS, &c.

Covenant not to extend to taxes in respect of improved value.

(*g*) *Vide ante*, Vol. 4, p. 397.

HUSBANDRY LEASE *by* TENANTS *in* COMMON, *at an* ENTIRE RENT. ADDITIONAL REDDENDUM *for* MONIES EXPENDED *by Lessors in* INSURING BUILDINGS *from* FIRE;—*also for* BREACH *of Rules of* CULTIVATION. PROVISO *for* RE-ENTRY *on* NON-PAYMENT *of* RENT, ALIENATION, BANKRUPTCY, *&c.* COVENANTS *by* LESSEE, *(in addition to the usual Covenants), to pay* RENT *and* TAXES, MAKE REPAIRS, *&c.—not to bring any* COMBUSTIBLES *upon the Premises, so as to* INVALIDATE FIRE-INSURANCE; *also to* BUILD *a* BARN. AGREEMENT *that in case* BUILDINGS *are* DESTROYED *by* FIRE, *they shall be* REBUILT *by* LESSOR, *and in the meantime a* DEDUCTION MADE *out of the* RENT. LIBERTY *to* LESSEE *to* PURCHASE *the* INHERITANCE *at the* END *of the* TERM, *at a* VALUATION. (VARIATIONS *(in notes) where* SEVERAL RENTS *are reserved to the Lessors, as distinct Owners).*

HUSBANDRY LEASE BY TENANTS IN COMMON.

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, BETWEEN [*lessors*], of &c., of the one part; and [*lessee*], of &c., of the other part. WHEREAS the said [*lessors*] are seised of or entitled in fee simple to the messuage, farm, lands, and hereditaments hereinafter mentioned, and hereby intended to be demised, in equal shares, as tenants in common (*a*), and

Parties.

Recital that the lessors are entitled as tenants in common.

(*a*) Joint-tenants have but one freehold, and therefore, in leases granted by them, the demise by, reservations to, and covenants with, them, are made precisely in the same manner as where the lease is granted by a

Distinction between leases by joint-tenants and tenants in common.

HUSBANDRY LEASE BY TENANTS IN COMMON.

they have agreed to grant to the said [*lessee*] a lease thereof, upon the terms and in the manner hereinafter ex-

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sole owner, the plural number being substituted for the singular, *ut ante*, p. 69. Whether the lessors are trustees, (as in the precedent referred to), or beneficial owners, the form of the demise is the same. It is not often that leases are made by joint-tenants, except in a fiduciary character.

Tenants in common, on the other hand, have several freeholds; and a lease granted by them concurrently, operates as a separate lease by each, of his share; Co. Litt. 45. a, 196. b.; and to declare upon such a lease as a joint demise, is bad. *Mantle* v. *Wollington*, Cro. Jac. 166; *Heatherley* d. *Worthington* v. *Weston*, 2 Wils. 232. If, in a lease made by tenants in common, the rent be reserved to them and their heirs simply, without any words of severance, this will not prevent their taking it as tenants in common, as the rent will follow the reversion; Co. Litt. 196. b.; and separate actions may be maintained by them on covenants entered into with them in similar terms, for it is the interest of the covenantees, and not the form of the covenants, which regulates the form of the action in such a case. *Eccleston* v. *Clipsham*, 1 Saund. 153; and *vide ante*, Vol. 4, p. 370. It is also clear, that a tenant in common may distrain separately for his share of the rent; *Whitley* v. *Roberts*, 1 M'Clel. & Younge, 107; notwithstanding that his co-tenant has himself become possessed of the lease; *Snelgar* v. *Helston*, Cro. Jac. 611; and the other tenants in common may also maintain an action on the covenants against such a co-tenant. *Yates* v. *Cole*, 2 Brod. & Bing. 660. If the lessee pay over the whole rent to one lessor, tenant in common, after notice from the other, he will be liable to pay the share of such other again. *Harrison* v. *Barnby*, 5 Durnf. & East, 246.

Remedies of tenants in common.

But it is not to be inferred from the preceding observations, that tenants in common have no joint remedies under demises made by them; for it is clear that, in personal actions, (as distinguished from actions concerning the realty, in which the rule is different), they may sue jointly or severally as they please. See Co. Litt. 198. b. Thus, it has been held that tenants in common may join or sever in debt, *Martin* v. *Crompe*, 1 Lord Raym. 341, or covenant, *Midgley* v. *Lovelace*, Carth. 289, *i. e.* they may join in an action for the entire rent, &c. or each may bring a separate action for his share; and the same rule would undoubtedly apply to actions for use and occupation, see 5 Barn. & Ald. 851, which have now in a great measure superseded actions of debt. This point, indeed, was assumed in a late case, where it appeared, that, in 1810, A. and B., tenants in common, demised to C. at an entire rent, who regularly paid his rent in one sum to their joint agent, until 1818, in which year he received notice from one of the land-

HUSBANDRY LEASE BY TENANTS IN COMMON.

pressed; NOW THIS INDENTURE WITNESSETH, that, in consideration of the rents hereinafter reserved, and of the covenants and agreements on the lessee's part hereinafter contained, they the said [*lessors*], according to their several and respective shares and proportions, *Have*, and each of them *Hath*, demised, leased, set, and to farm let, and by these presents *Do*, and each of them *Doth* demise, &c. unto the said [*lessee*], his executors, administrators, and assigns (*b*), ALL THAT messuage, tenement, or

Testatum.

Demise by lessors according to their shares.

Parcels.

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lords, to pay the moiety of the rent, in future, to him or his agent separately; and from that time to 1819, he accordingly paid his rent in equal moieties to the separate agents of the landlords, who gave him separate receipts for the same on account of each. The landlords afterwards brought a joint action for use and occupation, for two years' subsequent rent; and it was held that the learned Judge at Nisi Prius was wrong in nonsuiting the plaintiffs, on the ground, that in his opinion separate actions ought to have been brought; for that it was a question of fact for the Jury to say, whether it was the intention of the parties to enter into a new contract for a demise, with a separate reservation of rent to each. *Powis* v. *Smith*, 1 Dowl. & Ryl. 490; *S. C.* 5 Barn. & Ald. 850.

As to the best mode of reservation.

As, under a reservation of an entire rent to tenants in common, they have the option of bringing either joint or several actions, it should seem that this mode of reservation is preferable to that of reserving several rents to them, though the latter is the more usual mode. Where there are several reservations, of course a joint action cannot be brought. To be subjected to several actions and distresses is a hardship upon a lessee, but is an inseparable consequence of his holding under lessors, who are entitled to the demised property in undivided shares; to be disabled from suing in any other mode, (which is the result of making several reservations), is also disadvantageous to the lessors, by increasing the expense of prosecuting their remedies, which expenses may, amidst the vicissitudes of forensic warfare, ultimately fall upon themselves.

As to leases by co-parceners.

It should be noticed, that the preceding remarks in regard to leases by tenants in common are generally applicable to leases by co-parceners, because, though they have but one freehold with regard to the ancestor, yet, as to their disposing power, they have several interests; and therefore, a lease by several co-parceners is a separate demise by each of her share. *Milliner* v. *Robinson*, Moore, 682, pl. 939; and see Bac. Ab. tit. Leases, (O).

Variation, where lease is of undivided shares.

(*b*) If the lease is of certain undivided shares only, add—

"ALL THOSE —— undivided equal —— parts or shares

HUSBANDRY LEASE BY TENANTS IN COMMON.

farm-house, with the barns, stables, out-buildings, yards, gardens, and appurtenances thereto respectively belonging, situate and being in —— aforesaid; *And also,* ALL THOSE several closes or fields, situate, lying, and being in —— aforesaid, containing together —— acres, or thereabouts, and now in the occupation of the said [*lessee*]; and all buildings, hedges, ditches, fences, rights, members, and appurtenances, to or with the said messuage or tenement, farm-house, and hereditaments, or any of them, belonging or usually held, excepting and always reserving unto the said [*lessors*], their heirs, and assigns, out of and from the demise hereby made, all trees now or hereafter growing or being on or upon the premises hereby demised, with the lops and tops thereof, and free liberty of ingress, egress, and regress, for them respectively, and their respective servants, agents, and workmen, at all seasonable times in the year, to enter into and upon the same demised premises, for viewing and searching the condition of the same, and for felling, lopping, topping, hewing and converting, and with horses, carts, and carriages, carrying away any tree or trees now or hereafter growing thereon, and planting any new tree or trees in any of the hedge-rows belonging to the said premises; *And also,* for hunting (*c*), shooting, fishing, hawking, or otherwise sporting in or upon the said hereditaments and premises; To HAVE AND TO HOLD the said messuage or tenement, farm, lands, and premises hereby demised unto the said [*lessee*], his executors, administrators, and assigns, from the twenty-fifth day of March in this present year ——, for and during and unto the full end and term of —— years thence next ensuing; YIELDING AND PAYING therefore yearly and every year during the said term hereby granted, the yearly rent of £——, of lawful money of the United Kingdom, by equal half yearly payments, on the 29th day of Sep-

Exception of trees.

Habendum.

Reddendum.

(or otherwise as the case may be,) of them the said [*lessors*], of and in ALL THAT," &c.

(c) A reservation of hawking and hunting has been held not to extend to shooting. *Moore* v. Earl of *Plymouth,* 1 J. B. Moore, 346.

HUSBANDRY LEASE BY TENANTS IN COMMON.

tember and the 25th day of March (*d*), clear of all taxes, assessments, or impositions, already or to be hereafter charged, assessed, or imposed upon or in respect of the premises hereby demised, or any part thereof, or upon or in respect of the said yearly rent, or any part thereof, by authority of Parliament or otherwise howsoever (*e*); *And also* YIELDING AND PAYING yearly and every year during the said term, such further and other sums of money as the said [*lessors*], their heirs or assigns, shall from time to time expend in insuring, and keeping insured, the said messuage, farm-house, and buildings hereby demised, against loss or damage by fire, in any public insurance office in London or Westminster, in such sum or sums of money as they shall think proper, not exceeding the sum of £——, in respect of the said messuage, farm-house,

Reddendum of monies paid for insurance.

(*d*) Where, as in this case, a deduction is to be made out of the rent on an uncertain event, it seems better not to refer to it as an exception in the reservation, which renders it necessary in an action of debt on the *reddendum* to set forth the exception, though the event upon which it was to arise has not happened. *Vavasour* v. *Ormrod*, 6 Barn. & Cress. 430.

As to exception out of *reddendum* on a contingent event.

(*e*) The advantage of reserving an entire rent in leases by tenants in common, has already been pointed out, (*ante*, p. 95). By reserving the rent generally, as above, it will follow the reversion, and all questions arising from an inaccurate form of reservation are avoided. Where several rents are reserved to the lessors, the form will be as follows:—

Variation,

"YIELDING AND PAYING unto the said [*first lessor*], his heirs or assigns, the yearly rent or sum of £——, of lawful money of the United Kingdom; *And also* YIELDING AND PAYING unto the said [*second lessor*], his heirs or assigns, the like yearly rent or sum of £——, of like lawful money; *(and so on to the other tenants in common, if more than two);* such several yearly rents to be respectively payable, in equal portions, on the —— day of ——, and the —— day of ——, in every year during the said term, and the first half yearly payment thereof respectively to be made on the —— day of —— next."

Where there are several reservations.

The additional rents for ploughing pasture &c. should be reserved to the lessors severally, in a similar manner.

HUSBANDRY LEASE BY TENANTS IN COMMON.

Reddendum for breach of prescribed rules of husbandry.

and buildings, and the sum of £——, in respect of one year's rent thereof (*f*); *And also* YIELDING AND PAYING the additional yearly rent of 10*l.* for every acre of the said demised premises, and so in proportion for any less quantity than an acre, which the said [*lessee*], his executors, administrators, or assigns, shall manage or cultivate contrary to the regulations hereinafter in that behalf contained; the first payment of such additional rent or rents from time to time to be made on such one of the said half yearly days, as shall happen next after the breach of any of the said regulations, and such additional rent or rents to continue payable thenceforth, during the residue of the term hereby granted (*g*), and to be free from all

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As to insuring rent.

(*f*) In order to cover the whole loss sustained by the lessor, it is obvious that the amount of rent lost during the necessary period of the premises being uninhabitable should be included in the insurance. This, however, should only be done where the rent is suspended, as in the present case. Some offices make an allowance for the loss of rent, without any express insurance for the purpose.

(*g*) It is clear, that, under these clauses reserving additional rents for ploughing pasture or meadow land, or any breach of the prescribed rules of husbandry, the lessor may maintain an action of debt on the *reddendum*, or of covenant on the covenant to pay, and no relief can be obtained against the effect of such clauses in equity. *Vide ante*, Vol. 3, p. 442.

Construction of covenant not to plough for the last twenty years of the term.

In a late case, where a clause of this kind underwent much discussion, it was decided, *first*, that a clause reserving an additional rent *per* acre for meadow land, which the lessee should plough, dig, break up, ear, or convert to tillage, *during the last twenty years of the term*, applied to land which was meadow at the commencement of the lease, and not merely to that which was in such a state previously to the twenty years, having been ploughed by the tenant before that period; *secondly*, that, though the lessee had subsequently sown clover with the corn, and had taken two crops of hay from the clover, the land was to be considered as still in tillage; and *thirdly*, that even if laid down to permanent grass, the rent reserved did not cease on its restoration to pasture, but continued during the remainder of the term, though the clause did not, in terms, (as it generally does), provide for its continuance. *Birch* v. *Stevenson*, 3 Taunt. 469.

Where the question is, what is ancient pasture, the neglect of the tenant to plough any portion of the land during his lease, however long that

HUSBANDRY LEASE BY TENANTS IN COMMON.

taxes, rates, assessments, impositions, and deductions whatsoever; which regulations hereinbefore referred to are as follows (*h*), that is to say, That no flax, hemp, woad, or like impoverishing herbs or plants, shall be set or sown upon the said demised lands or any part thereof; that such of the closes as are called ——, shall not, nor shall any part thereof, be ploughed, broken up, or converted into tillage, without the previous consent in writing of the said [*lessors*], their respective heirs or assigns; that not less than ten acres of the residue of the said lands hereby demised, shall annually, during the said term, be laid down in rotation as grazing land, in a good and husband-like manner, and with proper seeds, and continue down as such three years at the least before the same shall be again broken up or converted into tillage; Further, that upon every acre of fallow there shall be spread ten quarters of good lime, and that no part of the said lands shall be mowed, except the meadow-land and seed-land, which meadow-land and seed-land shall be mowed only once in the year. PROVIDED ALWAYS, that in case the said yearly rent of £——, hereinbefore reserved, or any such additional contingent rent or rents as aforesaid, shall be in arrear or unpaid, in the whole or in part, by the space of twenty-one days next after the day or respective days whereon the same ought to be paid, according to the reservations hereinbefore made, (being lawfully demanded at the expiration of the said twenty-one days, or at any time afterwards, and not paid when demanded), or in case the said [*lessee*], his executors, administrators, or assigns, shall, without the previous consent in writing of the said [*lessors*], respectively, or their respective heirs or assigns, assign or underlet, or otherwise dispose of (unless by his

Clause regulating the management and cultivation of lands.

Proviso for re-entry on non-payment of rent,

Or alienation without consent (except by will), or bankruptcy, &c.

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lease may be, cannot constitute it such as against him. *Goring* v. *Goring*, 3 Swanst. 661.

(*h*) These clauses, and the subsequent covenants prescribing the course of husbandry, are set out, because they contain the most ordinary regulations of this kind; whereas, some of those exhibited in the former precedents are rather special.

HUSBANDRY LEASE BY TENANTS IN COMMON.

or their last will and testament (*i*), all or any part of the hereditaments and premises hereby demised, or in case the said [*lessee*] shall be found and declared a bankrupt under any commission of bankrupt, or shall take the benefit of any present or future act or acts of Parliament for the relief of insolvent debtors, or in case the said premises, or any part thereof, shall be seized or taken in execution under any judgment, decree, sequestration, or extent whatsoever, or in case the said [*lessee*], his executors, administrators, or assigns, shall not faithfully observe and perform all and singular the covenants herein contained, which on his or their part are or ought to be observed and performed, then and thenceforth, in any of the said cases, it shall be lawful for the said [*lessors*] respectively, according to their respective shares and proportions, and their respective heirs or assigns (*k*), into and upon the said premises hereby demised, or any part thereof, to enter, and the same to have, hold, and enjoy, as in their, or any of their, first and former estate and estates, and as if these presents had not been made, any thing herein

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(*i*) As to whether restrictions on alienation, generally, extend to testamentary dispositions, *vide ante*, Vol. 4, p. 367.

Form of conditions in leases by tenants in common.

(*k*) Though, as we have already observed, covenants entered into with tenants in common may be construed as *several* covenants, though not such in terms, their interest being *several*, yet it is by no means clear, that the same principle would be applied to conditions, which have always received a stricter construction; and, therefore, it is doubtful whether, under a power of re-entry given to them simply and their heirs, in case of the death of one of the lessors, his heirs could enter upon his share, for, if the condition were joint, the right of entry would survive. The power of re-entry, therefore, should be given to them "*respectively*, and their *respective* heirs and assigns." In cases where any doubt exists as to the proper terms of limiting the right of entry to the lessors, it may be as well simply to declare, that, in the event prescribed, the lease shall "cease, determine, and be absolutely void." Where several rents are reserved in leases granted by tenants in common, (but as to which *vide ante*, p. 95), some practitioners, from abundant caution, insert a separate proviso for re-entry for each, but there can be no doubt that the clause in the text would have the same effect.

HUSBANDRY LEASE BY TENANTS IN COMMON.

contained to the contrary thereof notwithstanding. AND the said [*lessee*], for himself, his heirs, executors, administrators, and assigns, doth hereby covenant and agree with the said [*lessors*] (*l*), their heirs and assigns, in manner following, that is to say, that he the said [*lessee*], his executors, administrators, or assigns, will, from time to time during the said term hereby granted, duly pay or cause to be paid the said yearly rent of £——, and also, in case the same shall become payable, the aforesaid additional rent and rents hereinbefore reserved, at or on the days or times and in manner hereinbefore appointed for payment of the same several rents, and according to the true intent and meaning of the reservations hereinbefore contained; *And also*, that he the said [*lessee*], his executors, administrators, or assigns, will, from time to time during the said term, pay and satisfy, or cause to be paid and satisfied, all taxes, rates, duties, assessments, and impositions already imposed, or to be hereafter imposed upon or in respect of the premises hereby demised, or any part thereof, as and when the same taxes, rates, assessments, and impositions shall become due; *And further*, that he the said [*lessee*], his executors, administrators, or assigns, will at all times during the continuance of the term hereby granted, at his and their own costs and charges, well and sufficiently repair, uphold, sustain, maintain, scour, cleanse, and keep in good and tenantable repair and condition, the messuage or tenement, buildings, and erections hereby demised, and which shall be erected by the said [*lessee*], his executors, administrators, or assigns, upon the said demised premises, during the said term hereby granted, and all posts, pales, rails, mounds, fences, walls, gates, hedges, and ditches, in, upon, or belonging to the said premises, or any part thereof, when, where, and so often as occasion shall require, damage by fire or other

Covenants by lessee—

To pay rents;

To pay taxes;

To make repairs.

Damage by fire excepted.

(*l*) Where several rents are reserved, the covenant should be with the "[*lessors*] separately, and their respective heirs and assigns," to pay "the said several yearly rents of £—— and £—— respectively hereinbefore reserved, and also," &c.

Variation where several rents are reserved.

HUSBANDRY LEASE BY TENANTS IN COMMON.

inevitable accident only excepted; *And also* will cultivate, till, and manage in a husband-like and proper manner, (regard being had to the rules and regulations hereinbefore contained), all the lands, hereditaments, and premises hereby demised; *And* the said messuage or tenement, erections and buildings, lands, hereditaments, and premises, with their respective appurtenances, so being in all things well and sufficiently repaired, upheld, sustained, maintained, tilled, cultivated, managed, and kept in good and tenantable repair and condition as aforesaid, will, at the expiration or sooner determination of the demise hereby made, yield up unto the said [*lessors*] respectively, and their respective heirs or assigns, together with all wainscots, chimney-pieces, hearths, partitions, windows, shutters, locks, doors, gates, bolts, bars, keys, and all other articles and things which, at any time during the term hereby granted, shall be fixed or belong to or used with the said hereby demised premises; *And also* that the said [*lessee*], his executors, administrators, or assigns, shall not nor will lop or top any tree or trees now or hereafter growing or being on the said demised premises, or any part thereof, or permit any such tree or trees to be lopped or topped, or drive or permit to be driven any nails in, or fix or permit to be fixed any rail or rails to, any such tree or trees, nor (except in regular rotation and in a husband-like manner) cut any of the hedges or thorns on or belonging to the said hereby demised hereditaments; and that he or they, at the time of cutting any such hedges or thorns, will secure the same against the bite of cattle, and scour the ditches next adjoining thereto, and throw up and embank the scourings to the roots of the hedges; *And also*, that he the said [*lessee*], his executors, administrators, or assigns, will (except as hereafter mentioned), spend and consume upon the premises hereby demised, all the hay, straw, and fodder, which shall arise, grow, or be made upon or from the said premises, during the term hereby granted, and lay or spread all the dung, muck, compost, and manure arising from the said hay, straw, and fodder, upon such part or parts of the said premises, as may most require the

To cultivate lands according to the rules before laid down.

And premises well repaired, &c. to deliver up at the end of term.

Not to cut trees.

Nor hedges and thorns, unless in a husband-like manner.

To spend hay, straw, and fodder on the lands.

To spread manure,

HUSBANDRY LEASE BY TENANTS IN COMMON.

same, they the said [*lessors*], their heirs or assigns, paying or allowing unto the said [*lessee*], his executors, administrators, or assigns, the value of all the dung, compost, and manure which, in the last year of the term hereby granted, shall be made from the said hay, straw, and fodder, produced on the said premises, and shall then remain good and unspread; And also of all such hay, to the extent of —— tons, gathered in such last year from the said premises, as shall remain sound and unspent at the expiration or sooner determination of the term hereby granted, such payment or allowance to be ascertained by two indifferent persons, one to be nominated by the said [*lessors*], their heirs or assigns, and the other of them by the said [*lessee*], his executors, administrators, or assigns; *And further*, that he the said [*lessee*], his executors, administrators, or assigns, will not, during the said term hereby granted, permit to be brought or deposited in or upon the said demised premises, any gunpowder, tallow, oil, pitch, tar, or other substance of such nature or quality, and in such quantity, as shall have the effect of invalidating any policy or policies of insurance, to be effected by the said [*lessors*], their heirs or assigns, as aforesaid, they the said [*lessors*], their heirs or assigns, producing to the said [*lessee*], his executors, administrators, or assigns, if requested by him or them so to do, the said policy or policies from time to time subsisting as aforesaid, or furnishing him or them with a copy or copies thereof, so far as respects any restriction or stipulation in regard to the matter aforesaid; *And lastly*, that he the said [*lessee*], his executors, administrators, or assigns, shall and will forthwith, at his or their own proper costs and charges, erect, build, and completely finish in a good, substantial, and workman-like manner, on the field called ——, one bullock-shed, one barn with granaries, a one-stall stable, one cart-lodge, and one harrow-house, to be composd of brick or stone, and to be tiled, and to be of such dimensions and classes as shall be suitable and proper for the premises hereby demised, and adapted for the reception of the horses, cattle, and produce used, depastured, and raised upon the said hereby demised premises, and in all other respects conformably and not inferior to the rate or class of buildings in

the lessors paying for the last year's manure;

And hay to the extent of —— tons.

Not to permit gunpowder, &c. to be deposited upon premises, so as to invalidate fire insurance.

Covenant to erect a barn.

HUSBANDRY LEASE BY TENANTS IN COMMON.

that part of the country where the same premises are situate; PROVIDED ALWAYS, *and it is hereby declared and agreed, by and between the said parties to these presents*, that if, at any time or times during the term hereby granted, the said messuage, farm-house, and buildings, hereby demised, or any part thereof, shall be destroyed by fire, then, and in every such case, all and every the sum or sums of money, which shall be received by the said [*lessors*], their heirs or assigns, by virtue of any policy or policies of insurance to be effected by them as hereinbefore mentioned, in respect of such messuage, farm-house, and buildings, (but not the sum which may be received, as aforesaid, in respect of the rent thereof), shall be forthwith expended by them the said [*lessors*], their heirs or assigns, in rebuilding or re-instating the said messuage, farm-house, and buildings, or such part thereof as shall be so destroyed as aforesaid; and until the same shall be so rebuilt and reinstated, an abatement or deduction shall be made out of the yearly rent of £———, hereinbefore reserved, to the extent and in manner following, (that is to say), in case the said messuage or farm-house shall be wholly destroyed or rendered uninhabitable, then an allowance or abatement of £——, *per annum*, (and so in proportion for any period less than a year), shall be made out of the said rent, during so long as the said premises shall remain in such uninhabitable state; and in case the said premises shall be partially destroyed only, then so much of the said annual sum of £——, as shall be proportioned to the nature and extent of the damage or injury sustained, shall be deducted on account of such damage or injury, and until the reparation thereof as aforesaid; (*Agreement to refer disputes respecting deduction to arbitration, ut ante*, Vol. 4, p. 425); *Provided nevertheless*, and it is hereby declared and agreed (*m*), that if the policy or policies of insurance to be effected by the said [*lessors*], their heirs or assigns as aforesaid, shall be invalidated in consequence of any combustible or other goods being suffered by the said

Proviso, that, in case of fire, premises to be rebuilt by landlord.

If policy be invalidated by the act of the lessee, rent not to be suspended.

(*m*) This clause, of course, would not interfere with the lessor's claim to damages under the lessee's covenant.

HUSBANDRY LEASE BY TENANTS IN COMMON.

[*lessee*], his executors, administrators, or assigns, to remain upon the said demised premises, contrary to the terms or stipulations of the said policy, and to the covenant of the said [*lessee*] hereinbefore contained; or if the said policy or policies shall be invalidated by any other act or default of the said [*lessee*], his executors, administrators, or assigns, so that there shall be no fund arising from such policy or policies for or towards the rebuilding of the said messuage, farm-house, and buildings as aforesaid, then and in such case no abatement or deduction shall be made out of the said rent hereinbefore reserved, by reason of the destruction of the said premises, or any part thereof, by fire as aforesaid, but the same shall continue payable as if the same had not happened (*n*); AND every of them the said [*lessors*], separately, and as to and concerning only his or her respective part or share of or in the said hereditaments and premises hereby demised, and for and in respect only of the acts, deeds, and defaults of himself or herself respectively, and his or her respective heirs, executors, administrators, and assigns, and of the person or persons claiming or to claim by, from, through, under, or in trust

Covenant by lessors, according to their respective shares, for quiet enjoyment.

(*n*) Where the landlord insures the property at the tenant's expense, as in this case, it seems to be fair, not only that he should be bound to rebuild in case of fire, but that the rent should be suspended until he does so, particularly where the insurance comprises a year's rent, which is about the time that the lessor, with reasonable diligence, may be supposed to require for the purpose. (As to the law respecting the liability of landlord and tenant in case of fire, *vide ante*, Vol. 4, p. 521; and see some suggestions, Ib. 426, 490).

As to suspending rent, in case of fire.

A covenant by the tenant to insure and keep insured "the sum of 800*l.* at the least, in some sufficient insurance office within the cities of London and Westminster," upon the demised premises, has been held to be sufficiently definite, being by reasonable intendment to insure the premises against fire in an office where policies against fire are usually effected. And it was also decided, that a neglect to renew a policy by payment of the premium within the fifteen days usually allowed by insurance offices beyond the yearly day of payment, was a breach of the covenant, though the office afterwards received the premium, as, during the interval, the landlord was unprotected by any insurance. The lessor, therefore, was held to be entitled to recover the premises under the usual clause of re-entry for breach of covenant. *Doe* d. *Pitt* v. *Shewin*, 3 Campb. 134.

Construction of a covenant by lessee to insure.

HUSBANDRY LEASE BY TENANTS IN COMMON.

for him or her respectively, doth hereby for himself and herself respectively, and his and her respective heirs and assigns, covenant and agree with the said [*lessee*], his executors, administrators, and assigns (*o*), That he, the said [*lessee*], his executors, administrators, and assigns, from time to time duly paying the rent or rents hereinbefore reserved, and performing the covenants, conditions, and agreements hereinbefore contained, which, on his and their part, are or ought to be paid and performed, according to the true intent and meaning of these presents, may peaceably and quietly hold, possess, and enjoy the said messuage or tenement, farm, lands, hereditaments, and premises hereby demised, with the appurtenances, for and during the term hereby granted, and without any interruption or disturbance whatsoever, of, from, or by the said [*lessors*], respectively, or their respective heirs or assigns, or any of them, or any person or persons claiming, or to claim, by, from, through, under, or in trust for them, or any of them; PROVIDED ALWAYS, *and it is hereby lastly agreed and declared between and by the said parties hereto*, that in case the said [*lessee*], his executors, administrators, or assigns, shall, at the expiration of the term hereby granted, be desirous to purchase the said messuage, farm, lands, and hereditaments, hereby demised,

Proviso, that lessee, at the end of the term, may purchase at a valuation.

(*o*) Sometimes the covenant of the lessors specifies the amount of their respective shares, thus—

Variation where the covenant of each is for a specified share.

"AND the said [*first lessor*], as for and concerning one undivided moiety or equal half part of and in the premises hereby demised, and the acts, deeds, and defaults of those claiming under him; and the said [*second lessor*], as for and concerning one other undivided moiety or equal half part of and in the same premises, and the acts, deeds, and defaults of those claiming under him, do hereby severally and respectively, and for their several and respective heirs, executors, administrators, and assigns, covenant," &c.

Where the lease does not specify the shares of the respective lessors, this seems to be the preferable mode, as the lessee is entitled to know in what proportions the lessors are responsible under their covenant. The preceding form (*i. e.* the form in the present note) may be used in covenants by joint-tenants, where each covenants for a particular share only.

HUSBANDRY LEASE BY TENANTS IN COMMON.

it shall be lawful for him or them so to do, upon giving to the said [*lessors*], their respective heirs or assigns, or leaving at their respective dwellings or usual places of residence or abode, twelve calendar months' notice of such wish or desire; and the price or consideration to be paid for the said premises shall be ascertained and fixed by two indifferent persons, to be chosen within —— months before the expiration of such notice, in manner following, that is to say: one of such persons to be chosen by the said [*lessors*], their heirs or assigns, and the other of them by the said [*lessee*], his executors, administrators, or assigns; and in case the said [*lessors*], their heirs or assigns, shall neglect or refuse to nominate such referee or appraiser on their part, within ——— before the expiration of the said twelve months, for which such notice shall be given as aforesaid, then the said two referees or appraisers shall be exclusively nominated and chosen by the said [*lessee*], his executors, administrators, or assigns; And in case such two persons to be appointed appraisers or referees as aforesaid, shall differ in opinion as to the value of the said premises, as aforesaid, then such value shall be ascertained and fixed by such one person as the two first referees shall for that purpose, previously to their entering on the business of the said valuation, nominate and appoint; And they the said [*lessors*] respectively, and their respective heirs or assigns, shall and will, within —— months after the said [*lessee*], his executors, administrators, or assigns, shall have given such notice as aforesaid, at their own costs, deliver to him or them an abstract of their title, and shall and will (*p*), upon payment of the sum of money to be fixed and ascertained as aforesaid, as the price or consideration for the purchase of the said demised premises as aforesaid, upon the request and at the costs and charges of the said [*lessee*], his executors, administrators, or assigns, convey and assure the same hereditaments and premises, and the fee-simple thereof, unto him the said [*lessee*], his executors, adminis-

(*p*) A stipulation affirming or negativing the purchaser's right to have the title deduced at the lessor's expense, should always be introduced into clauses of this nature, as the point sometimes occasions disputes.

HUSBANDRY LEASE BY TENANTS IN COMMON.

trators, or assigns, and his or their heirs and assigns, or otherwise, as he or they shall direct (*q*). In witness, &c.

Question arising on a covenant for pre-emption.

(*q*) In a late case, a lessor, for himself, his heirs, and assigns, covenanted with the lessee, his executors, administrators, and assigns, that, in case the lessor, his heirs or assigns, should at any time during the term have an advantageous offer for disposing of the land then lately fenced off from the west side of the demised premises, he (the lessor), his heirs or assigns, should not dispose of the same, without previously making an offer of the same to the lessee, his executors, administrators, or assigns, in writing, at *5l. per cent.* less than such offer, fourteen days at least before he should accept of the same. The lessee became bankrupt, and his assignees sold the demised premises to the plaintiff. The lessor subsequently sold these premises, and also the land which was the subject of the covenant for pre-emption (with other property) at one entire price to one of the defendants. It was held, that this sale was no breach of the covenant. *Collison* v. *Lettsom*, 6 Taunt. 224; *S. C.* 2 Marsh. 1.

In this case the Court, in the course of the argument, assented to the position that the benefit of this contract did not run with the land demised. (As to what covenants run with the land, *vide ante*, Vol. 4, p. 386.)

BY HUSBAND AND WIFE AND BY TENANT IN TAIL UNDER STAT. 32 HEN. 8.

LEASE *by* Husband *and* Wife seised *in* her Right *under Stat. 32 Hen.* 8, *c.* 28 (*a*). (Variations *where the* Lease *is by* Tenant in tail, *by virtue of this Statute*).

Parties.

THIS INDENTURE, made, &c., Between [*husband-lessor*], of &c., and [*wife-lessor*], his wife, of the one part;

(*a*) As to the requisites of leases under this statute, *vide ante*, Vol. 4, p. 326, and Co. Litt. 44. a., Bacon on Leases, 18, 30, 39. The statute does not extend to Copyholds. See Cro. Car. 440. Leases granted by tenants in tail, which are not within the statute, are voidable only (and not void) against the issue. Earl of *Bedford's* case, 7 Rep. 86. A dowress, it seems, may avoid such a lease *pro tanto*. Ib. In the late case of *Doe* d. *Southhouse* v. *Jenkins*, 3 Moore & Payne, 59, the acceptance of rent for ten years by an heir in tail was held to confirm, as against him, a lease for ninety-nine years granted by his ancestor.

and [*lessee*], of &c., of the other part. [WHEREAS the said [*husband*] and [*wife*], his wife, are seised of, or entitled in right of the said [*wife*] to the messuage or dwelling-house and hereditaments hereinafter mentioned, for an estate of inheritance in fee simple, and they have contracted with the said [*lessee*] to grant him a lease thereof, for the term and subject to the covenants and conditions hereinafter contained (*b*). NOW THIS INDENTURE] WITNESSETH, that, in consideration of the yearly rent hereinafter reserved, and of the covenants, conditions, and agreements hereinafter contained on the part of the said [*lessee*], his executors, administrators, and assigns, to be paid and performed, they the said [*husband*] and [*wife*], his wife, *Have*, and each of them *Hath* demised, leased, and to farm let, and by these presents *Do*, and each of

BY HUSBAND AND WIFE AND BY TENANT IN TAIL UNDER STAT. 32 HEN. 8.

Recital that lessors are entitled.

Testatum.

It is clear that the requisition in the statute, that the rent most "accustomably yielden" shall be reserved, does not prevent a lease being granted of part of a larger estate formerly demised, reserving a rent *pro ratâ*. Co. Litt. 44. b.; and see *Doe* d. Earl of *Shrewsbury* v. *Wilson*, 5 Barn. & Ald. 363. In the converse case, however, where two estates formerly demised separately are now leased together at an entire equivalent rent, the authorities are not equally decisive. In *Smith* v. *Trinder*, Cro. Car. 22, the point (which arose on the construction of a private act of Parliament) remained undetermined; but in Lord *Mountjoy's* case, 5 Rep. 4, it is expressly laid down, that such a lease is bad. In the late case of the Earl of *Shrewsbury*, the learned Judges considered Lord *Coke's* doctrine in *Mountjoy's* case as inconsistent with that advanced in his Commentary; and there can be little doubt that a lease comprising lands formerly demised separately, (assuming the rent to be sufficient in amount), would now be supported upon the same principle as leases of part only of lands formerly demised. It is better, however, to avoid the question, by granting separate leases. In all other points the literal terms of the statute should be followed as nearly as possible, where express decisions have not authorized a departure from them.

Whether lease may be of *part* of lands formerly demised at an entire rent, and *vice versâ*.

(*b*) If the lease be granted by tenant in tail, this recital will be—

"WHEREAS the said [*lessor*] is seised unto him and the heirs of his body *(or to him and the heirs male or female of his body, as the case may be)* of the hereditaments hereinafter mentioned, and he has contracted," &c.

Variation where lease is by tenant in tail.

BY HUSBAND AND WIFE AND BY TENANT IN TAIL UNDER STAT. 32 HEN. 8.

them *Doth* demise &c. unto the said [*lessee*], his executors, administrators, and assigns, *(Parcels and general words, ut ante, passim);* TO HAVE AND TO HOLD the said premises hereby demised, with their and every of their appurtenances, unto the said [*lessee*], his executors, administrators, and assigns, henceforth, for and during the term of twenty-one years now next ensuing and fully to be complete and ended; YIELDING AND PAYING therefore, yearly and every year during the said term of twenty-one years hereby granted, unto the said [*husband*] and to the said [*wife*] his wife, and to the heirs of the said [*wife*] (*c*), the yearly

Habendum.

Reddendum.

(*c*) If the lease is granted by tenant in tail, it will be—

"unto the said [*lessor*], and the heirs *(or the heirs male or female, as the case may be,)* of his body."

Form of the *reddendum* in leases by tenants in tail.

As the statute makes the leases of tenants in tail binding on the issue inheritable under the entail only, and they are absolutely void against the persons entitled in remainder or reversion, Co. Litt. 45. b., 46. a.; Cro. El. 602, so as to be incapable of being confirmed by their acceptance of rent, the reservation to and covenants with the lessor should be, it is conceived, simply to and with him and the heirs of his body, (if he be tenant in tail general), or the heirs male or female of his body, (as the case may be), if he be tenant in tail special; and it is not necessary or correct to use expressions comprehending the reversioner or remainder-man, unless he joins in the lease. Indeed, a reservation to the lessor, and his *heirs* (though inaccurate) has been held to carry the rent to the issue in tail, and therefore to be a sufficient reservation under the statute; *vide ante*, Vol. 4, p. 239; and a covenant framed in similar terms would no doubt receive the same construction. Any inaccuracy in regard to the reservation, however, may be avoided by a general reservation, which would be clearly sufficient; and if the covenant were so inaccurately framed, that an action of covenant for the rent could not be maintained by the heir in tail, he might bring an action of debt upon the *reddendum*.

As to *reddendum*, &c. in leases by husband and wife.

In regard to leases by husband and wife, however, it seems to be better to adhere strictly to the language of the statute, which requires that the rent should be reserved "to the husband and to the wife, and to the heirs of the wife," (*ante*, Vol. 4, p. 326), though there can, it is conceived, be little doubt that the Courts would hold a general reservation to be sufficient even in this case, as the rent would then follow the reversion, to secure which was evidently all that the Legislature had in view.

rent or sum of £——, of lawful money of Great Britain, without any deduction whatsoever on account of present or fu-

BY HUSBAND AND WIFE AND BY TENANT IN TAIL UNDER STAT. 32 HEN. 8.

Where an under-lease is to be granted of *leaseholds*, of which the husband is possessed in right of his wife, they may be made either with or without her concurrence, according to the intention of the lessor, in regard to the destination of the rent. (*Vide ante*, Vol. 4, p. 328). If it be intended that the under-lease shall operate as an alienation *pro tanto*, for the benefit of the husband, he alone may execute it; but if the rent be to follow the reversion, the wife should be made a party, and the reservation should be to him and her, their executors, administrators, and assigns. This is the preferable mode, because, upon the death of the husband, the reversion and the rent flow in the same channel, unless severed by a subsequent act of the husband, for it is to be observed, the husband has the same power of disposition over the rent so reserved, as he has over the reversion. In either case, the covenants and conditions should be made to correspond with the *reddendum*.

As to the *reddendum* in under-leases of the wife's chattels real.

It may be useful, in this place, to make a few remarks on leases granted by some other persons, of which forms have not been given.

Where a tenant for life and a reversioner or remainder-man in fee join in a lease, it is construed as the several lease of each party, according to his estate, with the confirmation of the other, *i. e.* as the lease of A. (the tenant for life), during his life, with the confirmation of B., (the reversioner or remainder-man), and after the decease of A. as the lease of B., with the confirmation of A. Moor, 686, pl. 939; Co. Litt. 45. a. The proper form of the covenants in such a case is, with "A. (the tenant for life) and his assigns during his life, and after his decease, with B., (the reversioner in fee), his heirs and assigns." The *Reddendum* (if not general) and the proviso for re-entry should be framed in a similar manner.

In leases by tenant for life and remainder-man.

With respect to leases from executors or administrators, for the reasons before stated, it is desirable that the concurrence of the persons beneficially entitled should be obtained. (*Vide ante*, Vol. 4, p. 323). If a legatee under a recent will assumes to deal with the property in this manner, the assent of the executor, or administrator *cum test. ann.* should be shewn by his joining in the lease. The reservation and covenants in such a case, of course, would be to and with the legatee, since the assent vests in him the legal title.

By executors or administrators.

In leases by trustees for charities, (as to which *vide ante*, Vol. 4, p. 328), it is usual to refer with more or less particularity to the deed creating the trust, and to recite that the proposed lease is beneficial to the charity.

By trustees for charity.

The variations in these several cases are not sufficiently important to render it necessary to present a distinct precedent for each.

BY HUSBAND AND WIFE AND BY TENANT IN TAIL UNDER STAT. 32 HEN. 8.

ture taxes, or otherwise howsoever, (the land-tax only excepted), by four equal quarterly payments, on the twenty-ninth day of September, the twenty-fifth day of December, the twenty-fifth day of March, and the twenty-fourth day of June, in every year, the first payment thereof to be made on the twenty-ninth day of September next ensuing. AND the said [*lessee*] doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said [*husband*] and [*wife*], his wife, and the heirs of the said [*wife*] (*d*), in manner following, (that is to say), that he the said [*lessee*], his executors, administrators, or assigns, will, from time to time during the said term hereby granted, duly pay or cause to be paid unto the said [*husband*] and [*wife*], his wife, and to the heirs of the said [*wife*], the yearly rent or sum of —— pounds of lawful money aforesaid, hereinbefore reserved, on the several days and times and in the manner hereinbefore appointed for the payment thereof, according to the true intent and meaning of these presents; *And also (to pay taxes, and other usual covenants);* And further, that the said [*lessee*], his executors, administrators, or assigns, will not, at any time during the said term, erect or set up any bow-window in or to the fore parlour of the said hereby demised messuage, tenement, or dwelling-house, or otherwise make any kind of alteration in the walls or principal timbers of the said messuage, tenement, or dwelling-house, without the consent in writing of the said [*husband*] and [*wife*], his wife, or the heirs of the said [*wife*], first obtained for that purpose; And shall not nor will, without such consent in writing as aforesaid, at any time or times during the said term hereby granted, permit or suffer any trade or business to be used, exercised, or carried on in or upon the said hereby demised premises, or any part thereof, or permit the same premises, or any part thereof, to be used for any auction or sale of goods, pictures, books, or other commodities, on any account

Covenants by lessee—

To pay rent;

Not to erect a bow-window, or make alterations without consent.

Not to permit any business to be carried on, except &c.

(*d*) If by tenant in tail the covenants will be with

"the said [*lessor*] and the heirs *(or heirs male or female, as the case may be)* of his body."

whatsoever, (the necessary merchandise and dealings of the said [*lessee*] in his business of an ——, and the sale of his the said [*lessee's*] household goods, furniture, and effects therein, during the said term hereby granted, only excepted); PROVIDED ALWAYS that if it shall happen that the said yearly rent or sum of £—— hereinbefore reserved, or any part thereof, shall be behind or unpaid by the space of twenty days next over or after any or either of the said days hereinbefore appointed for the payment thereof; Or if the said [*lessee*], his executors, administrators, or assigns, shall not, from time to time during the said term hereby granted, duly observe and perform all the covenants, conditions, and agreements herein contained, which on his and their parts are to be observed and performed, according to the true intent and meaning of these presents; Then and in such case, and from thenceforth, it shall be lawful for the said [*husband*] and [*wife*], or either of them, or the heirs of the said [*wife*] (*a*), being entitled for the time being to the reversion immediately expectant on the determination of the said term, into or upon the said messuage or dwelling-house and premises hereby demised, or into and upon any part thereof in the name of the whole, to re-enter, and the same to have again, repossess, and enjoy, as in their, his, or her first and former estate; And that, from and immediately after such entry shall be so made, the said term hereby granted shall cease, determine and be void, to all intents and purposes whatsoever, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding. (*Covenant for quiet enjoyment, ut ante*, p. 14, *substituting for* "their heirs, appointees, or assigns," *the words* "or her heirs"). IN WITNESS, &c.

BY HUSBAND AND WIFE AND BY TENANT IN TAIL UNDER STAT. 32 HEN. 8.

Proviso for re-entry on non-payment of rent.

(*a*) If by tenant in tail,

"for the said [*lessor*], and the heirs (*or heirs male or female, as the case may be*) of his body.

BY THE COMMITTEE OF A LUNATIC.

LEASE *for a* TERM, DETERMINABLE *with* LIVES, *executed by the* COMMITTEE *of a* LUNATIC *under the* DIRECTION *of the* LORD CHANCELLOR.

Parties.

Testatum.

THIS INDENTURE, made the —— day of ——, BETWEEN [*lunatic*], of &c., (a lunatic), of the one part; and [*lessee*], of &c., of the other part: WITNESSETH, that, in consideration of the yearly rent hereinafter reserved, and the conditions, covenants, and agreements hereinafter contained, on the part of the said [*lessee*], his executors, administrators, and assigns, to be paid and performed, the said [*lunatic*], (by [*committee*], of &c., committee of the estate of the said [*lunatic*], by virtue of an order of the Right Honourable —— —— of ——, Lord High Chancellor of Great Britain, bearing date on or about the —— day of ——, made under and by virtue of an act of Parliament, passed in the 11th year of the reign of King George the Fourth and the 1st year of the reign of King William the Fourth, intitled "An Act for consolidating and amending the Laws relating to Property belonging to Infants, Femes-covertes, Idiots, Lunatics, and Persons of unsound Mind,") *Hath*, with the approbation of —— Esquire, one of the Masters of the said Court of Chancery, to whom the matter of the said lunacy stands referred, as testified by a memorandum under his hand, appearing on the margin of these presents, demised and granted, and by these presents *Doth* demise and grant (*a*) unto the said [*lessee*], his executors,

Reference to Lord Chancellor's order.

(*a*) This, it is conceived, is the most correct form of a lease by the committee of a lunatic, for it is difficult to see the correctness of the practice which has been adopted in some of the forms in print, of making the committee and lunatic distinct parties to the lease. The lease is, to all intents and puposes, the lease of the lunatic; it takes effect out of his estate, and is directed by the act to be made in his name and on his be-

BY THE COMMITTEE OF A LUNATIC.

administrators, and assigns, *(Parcels and general words)*; TO HAVE AND TO HOLD, the said premises hereby demised, unto the said [*lessee*], his executors, administrators, and assigns, from the —— day of ——, 18—, for and during the term of —— years thence next ensuing, if [*cestui que vie*], now aged about five years, [*second cestui que vie*], now aged about twelve years, and [*third cestui que vie*], now aged about nine years, or either of them, shall so long live. YIELDING AND PAYING therefore yearly and every year during the said term, [unto the said [*lunatic*], his heirs, and assigns], the yearly rent or sum of £——, of lawful money of Great Britain, by two equal half yearly payments, upon the twenty-fourth day of June and the twenty-fifth day of December, in every year, the first payment thereof to be made on the twenty-fourth day of June next ensuing, if the said term shall be then subsisting: And if the said term shall determine on any other day than the twenty-fourth day of June, or the twenty-fifth day of December, in the present or any future year, then YIELDING AND PAYING a proportional part of the said rent, for the interval or period which shall elapse between the day of the date of these presents and the last of the said days of payment, as the case may be, and the determination of the said term, such proportional payment to be due and payable on the last day of the said term. AND the said [*lessee*] doth hereby for himself, his heirs, executors, administrators, and assigns, covenant and agree with the said [*lunatic*], his heirs and assigns, in manner following, (that is to say), *(usual covenants by lessee, Covenant by les-*

Habendum.

Reddendum.

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half*; the statute merely supplying the defect of mental capacity, by clothing the act of the committee, executed conformably to its provisions, with the same effect as if done by the lunatic himself. The *reddendum* and covenants should be made simply to and with the lunatic alone.

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* This expression occurs in the preceding clause of the act, relating to conveyances and mortgages, and would, of course, though not used in the sections regarding leases, apply to all assurances which the committee makes by virtue of the act.

BY THE COMMITTEE OF A LUNATIC.

sor for quiet enjoyment, in the usual form). In witness, &c.

(The mode of execution is as follows:)

A. B. [*the lunatic*], by C. D. [*the committee*].

(Memorandum, *signed by the Master:—)*

I approve of and allow this indenture of lease as contained in this and the preceding skin of parchment. As witness my hand this —— day of ——.

[*Master's signature*].

BY A GUARDIAN AND WARD.

LEASE *of a* Mansion-house, Furniture, *and* Park *and* Deer, *by a* Minor *and his* Guardian, *with special Provisions as to the* Preservation *and* Management *of the* Deer. *Agreement, that if, by the Diminution or Increase of the Stock, the Deer shall be of less or greater Value at the End of the Term, the Difference in Value to be paid by Lessee or Lessor, as the case may be.*

Parties.

THIS INDENTURE, made &c., Between —— of ——, [*guardian*], of &c., guardian of the person and estates of [*minor*], of &c., a minor, of the age of —— years, of the first part; the said [*minor*], of the second part; and

Testatum.

[*lessee*], of &c., of the third part: Witnesseth, that, in consideration of the rents, covenants, and agreements hereinafter reserved and contained, on the part of the said [*lessee*], his executors, administrators, and assigns, to be kept and performed, he the said [*guardian*] (*a*), and also

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(*a*) As to the power of a guardian to make leases during the guardianship, *vide ante*, Vol. 2, p. 404. Where the lease is not to expire with the guardianship, it seems to be better to make the infant join in it, because,

BY A GUARDIAN AND WARD.

the said [*minor*], *Have*, and each of them *Hath*, demised and leased, and by these presents *Do*, and each of them *Doth*, demise and lease unto the said [*lessee*], his executors, administrators, and assigns, All that capital messuage, &c., and all that park or inclosed grounds adjoining thereto, surrounded by a brick wall, and containing together, by estimation, one hundred and sixty acres, or thereabouts, (be the same more or less); and all ways, paths, passages, waters, water-courses, easements, privileges, profits, commons, pastures, feedings, commodities, emoluments, advantages, and appurtenances whatsoever to the said capital messuage or mansion-house, park, and premises, respectively belonging, or in anywise appertaining; *And also* the stock of deer in the said park, the numbers, ages, and values whereof are mentioned and particularized in the schedule hereunder written, marked A., signed by the said [*guardian*] and [*lessee*]; and likewise the reasonable use and wear of all and singular the fixtures, household goods, furniture, implements of household, and other things, which are mentioned and specified in the second schedule hereunder written, marked B., and also signed by the said [*guardian*] and [*lessee*]; except and always reserved out of this present demise, unto the said [*minor*], his heirs and assigns, and his guardian for the time being, (*All trees* (*b*), &c. *ut ante*, p. 2). To

Parcels.

General words.

Deer.

Use of furniture &c.

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in that case, though he might avoid the lease at his majority, yet it would be voidable only, and might therefore be confirmed by his acts; (*vide ante*, Vol. 4, p. 322); whereas it seems to be the better opinion, that a lease made by a guardian only is absolutely void against the ward, after his minority has ceased. *Roe* v. *Hodgson*, 2 Wils. 129, 135.

If the rent be reserved to, and the covenants entered into with the infant, he should of course be a party to the deed. In a late case, where the covenant to pay rent was entered into with the lessors and the infant, *who was not a party*, it was held, that an action in which the infant was joined could not be sustained. Lord *Southampton* v. *Brown*, 6 Barn. & Cress. 718.

(*b*) As to waste, see Co. Litt. 53. a.; 2 Roll. Ab. 813; and as to the tenant's right to estovers, *i. e.* his right to cut wood for house-bote, plough-bote, cart-bote, fire-bote, and hedge-bote, see 2 Roll. Ab. 817, Co. Litt. 53. b.; *Darcy* v. *Asquith*, Hob. 238, *S. C.* Hutt. 19; *Gorges* v. *Stanfield*, Cro. El. 593; *Lile* v. *Martin*, Latch, 96; 3 Leon. 16, pl. 38; see also *Lee* v. *Alston*, 1 B. C. C. 194, and Chamb. Landl. & Ten. 337; Com. Landl. & Ten. 178. In a late case, where the lessor's bailiff was to *de-*

BY A GUARDIAN AND WARD.

Habendum.

HAVE AND TO HOLD the said messuage or mansion-house, buildings, gardens, park, deer, and the use and enjoyment of all the said fixtures, household goods, and other things hereinbefore mentioned or referred to, and all and singular other the premises hereby demised, unto the said [*lessee*], his executors, administrators, and assigns, from the —— day of —— last past, for and during and unto the full end and term of seven years thence next ensuing and

Reddendum.

fully to be complete and ended; YIELDING AND PAYING, therefore, [unto the said [*minor*], his heirs or assigns, or his guardian for the time being], the yearly rent or sum of £——, of &c., by equal quarterly payments, upon the —— day of ——, the —— day of ——, the —— day of ——, and the —— day of ——, in every year during the said term, the first payment thereof to be made on the —— day of —— now next ensuing; *And also* YIELDING AND PAYING (10*l. an acre for land ploughed, ut ante*, p. 4.)

Covenants by lessee.

AND the said [*lessee*] doth for himself, his heirs, executors, administrators, and assigns, covenant and agree with the said [*guardian*], and also with the said [*minor*], his heirs and assigns, by these presents, in manner following, (that is to say), that he the said [*lessee*], his executors, administrators, or assigns, will, from time to time during the said term hereby granted,

To pay rent.

duly pay or cause to be paid unto the said [*minor*], his heirs and assigns, or his guardian for the time being, the several rents hereinbefore reserved, on or at the days or times hereinbefore mentioned or appointed for payment thereof, as and when the same respectively shall become due and payable as aforesaid, according to the true intent and meaning of these presents, without any deduction or

To pay taxes.

abatement whatsoever out of the same rents respectively, (the land-tax only excepted); *And also*, that he, the said [*lessee*], his executors, administrators, or assigns, will,

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liver to the lessee timber for house-bote, gate-bote, and bar-bote, it was held, that the pointing out and marking a tree was a sufficient "delivery" to authorize the lessee to fell it. *Courtenay* v. *Fisher*, 12 Moore, 39. As the rule of law on the subject of estovers rarely comes into operation at this day, the rights of tenants in this respect being almost invariably made the subject of express stipulation, it will be sufficient to refer to these sources of information.

from time to time during the said term, pay and discharge all rates, taxes, assessments, and impositions whatsoever, imposed or to be imposed on the premises hereby demised or any part thereof, by authority of Parliament or otherwise howsoever, (the land-tax only excepted); *And also*, that the said [*lessee*], his executors, administrators, or assigns, will, from time to time during the said term, when and as often as occasion shall require, at his or their costs and charges, well and sufficiently glaze and repair all the glass doors, windows, sashes, and casements in and belonging to the said hereby demised premises, or any part thereof, and well and sufficiently repair, uphold, support, maintain, sustain, cleanse, scour, empty, and keep the park, and all the mounds, fences, hedges, ditches, gates, bridges, stiles, rails, pales, posts, drains, which already are, or at any time hereafter during the term hereby granted, shall be erected or being on the said premises, or any part thereof, in good and sufficient order and repair; and will also fence and preserve all the wood and underwood on the said demised premises, so and in such manner as will prevent the deer or any sheep or cattle from doing any damage or mischief thereto; *And* will, from time to time during the said term, keep all the said gardens and hot-houses properly stocked, planted, weeded, gravelled, rolled, cleaned, and preserved; and well and sufficiently improve, rail up, and preserve all the shrubs, fruit-trees, plants, vines, and other trees now growing, or hereafter to be growing, in the said gardens and hot-houses, and as often as the same or any of them happen to die or decay, will plant others in their places, of as good or better sort; and also keep such of the ponds in the premises hereby demised, as are now stocked with fish, properly stocked therewith. And all the said hereby demised premises being so well and sufficiently repaired, upholden, sustained, cleansed, scoured, fenced, stocked, planted, weeded, gravelled, rolled, preserved, and kept in good order and repair as aforesaid, together with all the household goods, furniture, implements of household, and other things which are mentioned in the said schedule marked B., hereunder written, he the said [*lessee*], his executors, administrators, or assigns, will, at the end or other sooner determination of the

BY A GUARDIAN AND WARD.

To repair.

To keep the gardens and hot-houses, stocked:

To preserve the shrubs and fruit rees:

To keep ponds stocked with fish:

BY A GUARDIAN AND WARD.

said term hereby granted, peaceably and quietly yield up unto the said [*minor*], his heirs, executors, administrators, and assigns, or his guardian for the time being respectively, (the reasonable use and wear of all the said premises and casualties by fire in the meantime only excepted); *And also* that the said [*lessee*], his executors, administrators, or assigns, will, from time to time during the said term, take care of and support the stock of deer in the park hereby demised, and keep up and preserve the same, and kill and dispose of only such part thereof, every year, as shall be consistent with the course of breeding, managing, preserving, and killing deer, so and in such manner as that the stock of deer in the said park may yearly and every year be kept up to the same number, and of the same ages and values, as the present stock of deer, or as near thereto as conveniently can be; and such stock of deer, so kept and preserved in manner aforesaid, will, at the end or other sooner determination of the said term of seven years, deliver up in the said park unto the said [*minor*], his heirs, or assigns, or his guardian for the time being. And if such stock of deer, at the end or other sooner determination of the said term, shall not be equal in number and value to the present stock of deer mentioned in the said schedule marked A., as aforesaid, then and in such case he the said [*lessee*], his executors, administrators, or assigns, will, immediately on the end or sooner determination of the said term, or as soon afterwards as the amount of the said inadequacy or diminution shall be ascertained in manner hereinafter mentioned, pay unto the said [*minor*], his heirs or assigns, or his guardian for the time being, such sum of money as shall be equal to the amount or value of such deficiency mentioned, unless such decrease of number or deficiency in value shall be occasioned by some epidemic or contagious disease or distemper, which shall have arisen amongst the said deer. And *it is hereby agreed and declared* by and between the parties hereto, that if the said [*lessee*], his executors, administrators, or assigns, shall during the term hereby granted duly and properly manage and preserve the stock of deer in the said park, according to the usual course of breeding, managing, preserving, and kill-

To keep up the stock of deer.

And to pay the value of any deficiency.

Compensation to be made to lessee for increase of stock of deer.

BY A GUARDIAN AND WARD.

ing deer, and there shall be, at the end or sooner determination of the said term, an increase in the number and value of the stock of deer in the said park which shall be so delivered by him or them as aforesaid, then that the said [*minor*], his heirs or assigns, or his guardian for the time being, will, immediately on the end or sooner determination of the said term hereby granted, or as soon afterwards as the amount or value of such increase shall have been ascertained in manner hereinafter mentioned, pay or cause to be paid unto the said [*lessee*], his executors, administrators, or assigns, such sum of money as shall be equal to the additional or increased value of such stock of deer as shall be so delivered up as aforesaid, not exceeding in the whole the number of —— deer. *Provided always*, and it is hereby agreed and declared, that in case any dispute shall arise as to the state or condition of the said stock of deer, at the end or sooner determination of the said term, or as to the amount to be paid or received by the said [*lessee*], his executors, administrators, or assigns, on account of the diminution or increase of the value thereof, the same shall be referred to two indifferent persons. *(Continue this clause, ut ante,* p. 15, *and add usual covenants and proviso for re-entry. The proviso for re-entry should be reserved to the minor, his heirs, and assigns, or his guardian for the time being).* IN WITNESS, &c.

Agreement to refer disputes to arbitration.

SCHEDULE A, to which the preceding indenture refers.

SCHEDULE B, to which the preceding indenture refers.

OF A RIGHT OF WAY.

LEASE *of a qualified* RIGHT *of* WAY, *at a certain Rent, with an* ADDITIONAL RENT *for every* OCCASION *in which the Way shall be* USED *for certain* PURPOSES. COVENANTS *by* LESSEE *to* PAY RENTS—NOT *to* ERECT *any* BUILDING *on adjoining* PREMISES *belonging to him above a certain Height—Not to* USE *the* WAY *for the before-mentioned* PURPOSES. POWER *to Lessor to* DISTRAIN *for Rents on Lessee's* ADJOINING PREMISES *—also to* DETERMINE LEASE *in case of* NON-PAYMENT *of* RENT, *or if* LESSEE *should* ERECT *any* BUILDING *contrary to his Covenant.*

THIS INDENTURE, &c., BETWEEN [*lessor*], of &c., of the one part; and [*lessee*], of &c., of the other part:

Recital that lessor is entitled.

WHEREAS the said [*lessor*] is seised of or entitled in fee-simple to a certain messuage, tenement, or building, called —— Street Chambers, situate, &c., and which said messuage, tenement, or building is divided or parcelled out into divers chambers or apartments, which are let by the said [*lessor*] to different persons as or for counting-houses, and the entrance or access to such chambers, apartments, or counting-houses, is through a passage or way leading from the east side of —— Street aforesaid, along the south side of the aforesaid messuage, tenement, or building, called ——, the ground and soil of which said passage or way, and the freehold and inheritance thereof, are also the property of the said [*lessor*].

—That lessee is possessed of an adjoining messuage.

AND WHEREAS the said [*lessee*] is possessed of, or entitled to, a messuage or tenement and yard or garden belonging to and immediately behind the same, situate on the east side of —— Street aforesaid, for an unexpired term of seventy years, from the —— day of ——, which said messuage or tenement lastly mentioned, and

the said yard or garden behind the same, adjoin to the said messuage, tenement, or building called —— Street Chambers, and are separated therefrom by the said way or passage hereinbefore mentioned, which said way or passage runs along and bounds the whole of the north side of the messuage or tenement and yard or garden of or belonging to the said [*lessee*], as aforesaid: AND WHEREAS the said [*lessee*] is about to erect a counting-house and warehouse in the said yard or garden behind the said messuage or tenement, of or to which he is so possessed or entitled as aforesaid, and being desirous of having an entrance or access to the said counting-house and warehouse by or through the said way or passage hereinbefore mentioned, he hath requested the said [*lessor*] to grant to him, his executors, administrators, and assigns, a right of way through the aforesaid passage to the said intended counting-house and warehouse, for the period and in manner hereinafter mentioned, which he the said [*lessor*], hath agreed to do. NOW THIS INDENTURE WITNESSETH, that in pursuance of the said recited agreement, and in consideration of the yearly rent hereinafter reserved, and of the covenants hereinafter contained on the part of the said [*lessee*], his executors, administrators, and assigns, to be paid and performed, he the said [*lessor*] *Hath* granted and demised, and by these presents *Doth*, &c. unto the said [*lessee*], his executors, administrators, and assigns, free liberty and right of way and passage, and of ingress, egress, and regress, to and for him and them, and his and their and every of their apprentices and friends, and all and every other person and persons going to and coming from the said counting-house and warehouse, so intended to be built by the said [*lessee*], his executors, administrators, or assigns, as aforesaid, or either of them, (except as hereinafter excepted), from time to time and at all times, from the hour of nine o'clock in the morning until nine o'clock in the evening daily, during the term hereby granted, in, to, and from the said counting-house and warehouse, so intended to be built as aforesaid, or either of them, to go, pass, and repass on foot, in, by, and through the said way or passage hereinbefore mentioned to separate or divide the

OF A RIGHT OF WAY.

Of lessee's intention to erect a counting-house, &c., and agreement for demise of right of way.

Testatum.

Demise.

Liberty of way.

OF A RIGHT OF WAY.

said messuage or tenement, so belonging to the said [*lessee*] as aforesaid, from the said messuage, tenement, or building, called —— Street Chambers as aforesaid, (save and except nevertheless that these presents shall not be construed to grant or give a right of passage to or for any person or persons bringing or carrying to or from the said intended warehouse and counting-house, or either of them, any coal or ashes, night-soil, dirt, or filth, or any other matter or thing whatsoever, which may be or become a nuisance to the person or persons for the time being occupying the said chambers or apartments of or belonging to the said [*lessor*] as aforesaid, or any of them, nor to or for any person or persons bringing or conveying to or from the said counting-house or warehouse, or either of them, any meat or any other articles of provision, for the supply or use of the family of the said [*lessee*], his executors, administrators, or assigns, or of other the person or persons for the time being occupying the said messuage or tenement situate on the south side of the said way or passage, or the said intended counting-house or warehouse); TO HAVE AND TO HOLD the said liberty and right of way and passage, and of ingress, egress, and regress hereinbefore mentioned, (except as before excepted), unto the said [*lessee*], his executors, administrators, and assigns, from the —— day of ——, in the present year —— (*a*), for the term of seventy years thence

Exception in respect of certain purposes.

Habendum for seventy years.

Lease construed in reference to the time of its execution.

(*a*) Sometimes, by the terms of the *habendum*, the lease is to commence from the preceding quarter day, and then the lease being inadvertently dated on such quarter day, it is, upon the face of it, a lease to commence from the year before. In a late case where this occurred, the *habendum* in the lease being from the 25th of March *last*, and the lease being dated on that day, though executed afterwards, the Court held that the term was to be computed from the 25th of March preceding the *execution*, and not preceding the date, *i. e.* from the day of the date, and not from that day in the year before, on the well known principle that a deed operates from the execution, and not from the date. *Steele* v. *Mart*, 6 Dowl. & Ryl. 392. This case shews the convenience of making the *habendum* from a day and year specified, instead of some day preceding the date, and which is liable to variation with the date. Another mode not unfrequently adopted, and which is still more objectionable, is to date the lease on the quarter

OF A RIGHT OF WAY.

Reddendum.

next ensuing; YIELDING AND PAYING therefore yearly and every year during the said term of seventy years hereby granted, the yearly rent or sum of 10*l.*, of lawful money of the United Kingdom, by equal half yearly payments, on the —— day of —— and the —— day of ——, in every year, free from all taxes, and without any other deduction whatsoever, the first payment thereof to be made on the —— day of —— next; *And also* YIELDING AND PAYING over and above the said yearly rent or sum of 10*l.* the further yearly rent or sum of £——, of like lawful money, upon the —— day of ——, in every year, for each and every occasion in which the said [*lessee*], his executors, administrators, or assigns, shall, during the said term, bring or carry, or permit to be brought or carried, by his or their servants or agents, or the servants or agents of any person or persons employed by him or them, in, through, or over the said way or passage hereinbefore mentioned to be the property of the said [*lessor*], and situate on the south side of the said chambers or apartments, as aforesaid, to or from the said counting-house or warehouse so intended to be built by the said [*lessee*], his executors, administrators, or assigns, as aforesaid, any coal, ashes, night-soil, dirt, or filth, or any other matter or thing whatsoever, which may be or become a nuisance to the person or persons for the time being occupying or using the said chambers or apartments, situate and being on the north side of the said way or passage as aforesaid, or any of them, or any meat or other provision for the supply or use of the family of the said [*lessee*], his executors, administrators, or assigns, or of such other person or persons for the time being occupying the said messuage or tenement of the said [*lessee*],

Reddendum of additional rent in case way shall be used for certain purposes.

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day from which the term is intended to be computed, and make it in terms a lease from the date. If the rule of construction just referred to were applied to such a case, it is obvious that the intention of the parties would be defeated, as the term would be computed from the period of the execution, and not from the date; and though it is probable that in such a case the Court would be disposed to read the *habendum* as if framed to take effect on that day, without reference to the date, in order to uphold the intention of the parties, it is better not to raise the question.

OF A RIGHT OF WAY.

or such intended counting-house or warehouse as aforesaid, the first payment of such additional and contingent rent or rents as aforesaid to be made on the said —— day of —— next after the said liberty or right of way hereby demised shall have been used for any of the purposes aforesaid, and to continue payable during the whole residue then to come of the said term. AND in consideration of the premises, the said [*lessee*] doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said [*lessor*], his heirs and assigns, in manner following, (that is to say), that he the said [*lessee*], his executors, administrators, or assigns, will, from time to time during the said term hereby granted, duly pay or cause to be paid unto the said [*lessor*], his heirs or assigns, the said yearly rent or annual sum of 10*l.* hereinbefore reserved, and the said contingent rent or rents hereinbefore also reserved, (if the same shall become payable), on the respective days on which the same rents shall respectively become payable as aforesaid, without any deduction whatsoever, on account of present or future taxes or otherwise; *And also* that he the said [*lessee*], his heirs, executors, administrators, or assigns, will not at any time or times during the said term hereby granted, erect or permit to be erected, in or upon the said yard or garden of him the said [*lessee*], appurtenant to and situate behind the said messuage or tenement in —— Street aforesaid, which he is now possessed of or entitled to as aforesaid, or in or upon any part or parts thereof, any outhouse, counting-house, warehouse, or other building whatsoever, which shall exceed ten feet in height, to be computed from the level or surface of the said yard or garden; *And also*, that he the said [*lessee*], his executors, administrators, or assigns, will not, at any time or times during the said term, permit the said passage or way hereinbefore mentioned to belong to them the said [*lessor*], to be made use of by any person or persons whomsoever, coming to or going from the said counting-house or warehouse, so intended to be built by him the said [*lessee*], for the purpose of carrying or conveying coals, ashes, night-soil, dirt, filth, or other thing which may be or become a nuisance to the person or persons for the time being occupying the aforesaid

Covenant to pay the rent.

Not to erect any building on adjoining premises belonging to lessee above a certain height.

Not to use the way for certain purposes.

apartments or chambers situate on the north side of the said passage as aforesaid, or any of them, or for the purpose of supplying the family of the said [*lessee*], his executors, administrators, or assigns, or other person or persons occupying the said messuage situate on the south side of the said passage or way as aforesaid, or the said counting-house or warehouse so intended to be built as aforesaid, with any meat or other articles of provision whatsoever: PROVIDED ALWAYS, *and it is hereby declared and agreed by and between the said parties hereto,* [and particularly the said [*lessee*], for himself, his executors, administrators, and assigns, doth hereby grant, covenant, and agree to and with the said [*lessor*], his heirs and assigns], that in case the said yearly rent of 10*l.* hereby reserved, or the said contingent rent or rents hereby also reserved, (if the same shall have become payable), or any of them, or any part thereof respectively, shall, at any time or times during the said term of seventy years, be unpaid by the space of fourteen days next after either of the said respective days hereby appointed for the payment thereof respectively; Then, and in every such case, it shall be lawful for the said [*lessor*], his heirs or assigns, into and upon the said messuage or tenement and premises in —— Street aforesaid, of or to which the said [*lessee*] is possessed or entitled as aforesaid, or into and upon any part thereof, or into and upon the said counting-house and warehouse so intended to be built, or any part thereof, to enter and distrain for the same rent or rents, and all arrears thereof respectively, and the distress and distresses then and there found to deal with according to law, in like manner as landlords are authorized to do for rent in arrear; *To the intent* that thereby and therewith the said [*lessor*], his heirs and assigns, may be fully paid and satisfied the said yearly rent of 10*l.*, and all arrears thereof, and the said contingent rent or rents, or so much thereof respectively as shall be then remaining due and unpaid, and all costs and expenses whatsoever occasioned by the non-payment thereof respectively. PROVIDED ALSO, *and it is hereby further agreed and declared between and by the said parties hereto,* that in case the said yearly rent or annual sum of 10*l.*, or any part thereof, or the said contin-

OF A RIGHT OF WAY.

Power to distrain.

Power to determine the lease.

OF A RIGHT OF WAY.

gent rent or rents hereby respectively reserved as aforesaid, or any part thereof respectively, shall be unpaid by the space of twenty-eight days next after the time or respective times on which the same respectively ought to be paid as aforesaid, (being first lawfully demanded at the expiration of the said twenty-eight days, or at any time afterwards); or in case the said [*lessee*], his executors, administrators, or assigns, shall, at any time or times during the said term of seventy years, erect or cause or suffer to be erected in or upon the said yard or garden of him the said [*lessee*], appertaining to and situate behind the said messuage or tenement in —— Street aforesaid, of or to which he is so possessed or entitled as aforesaid, or in or upon any part or parts thereof, any outhouse, counting-house, warehouse, or other building whatsoever, which shall exeeed ten feet in height from the level or surface of the said yard or garden as aforesaid; Then, and in either of the said cases, if the said [*lessor*], his heirs or assigns, shall tender or cause to be tendered unto the said [*lessee*], his executors, administrators, or assigns, the sum of 1*s.* of lawful money of the United Kingdom, with the intent to make void the demise hereby made; And also shall within six calendar months then next following, by any deed or writing under the hand and seal, or respective hands and seals of him the said [*lessor*], his heirs or assigns, attested by two or more credible witnesses, signify and declare his or their intention to that effect, these presents, and the demise hereby made, and the said term of seventy years, shall, from and immediately after the sealing and delivery of such deed or writing, cease, determine, and be absolutely void to all intents and purposes whatsoever; *And lastly*, the said [*lessor*] doth hereby for himself, his heirs, executors, administrators, and assigns, covenant and agree with the said [*lessee*], his executors, administrators, and assigns, in manner following, that is to say, that it shall be lawful for the said [*lessee*], his executors, administrators, and assigns, and his, their, and every of their friends and apprentices, and all and every other person and persons, (except as before excepted), going to and coming from the said counting-house or warehouse, so intended to be built as

Covenant for quiet enjoyment.

aforesaid, from time to time, and at all times, from the said hour of nine o'clock in the morning to the hour of nine o'clock in the evening daily, during the said term hereby granted, (he the said [*lessee*], his executors, administrators, or assigns, during such term paying the said yearly rent of 10*l.*, and such contingent rent or rents as aforesaid, if the same shall have become payable, and performing all and singular the covenants hereinbefore contained on his and their parts), to go, pass, and repass on foot, into and from the said counting-house or warehouse intended to be built as aforesaid, in, by, and through the said way or passage hereinbefore mentioned, without any hinderance or disturbance whatsoever, of, from, or by the said [*lessor*], his heirs or assigns, or any person or persons claiming or to claim by, from, through, under, or in trust for him or them. IN WITNESS, &c. OF A RIGHT OF WAY.

LEASE *of an* IMPROPRIATE RECTORY, *from the Warden and Minor Canons of St. Paul's Cathedral, London, for Twenty-one Years, excepting the Parsonage House, &c.* (*a*). OF A RECTORY.

THIS INDENTURE, &c. BETWEEN the Reverend [*warden*], clerk, warden of the college of the twelve minor canons of the Cathedral Church of St. Paul, in London, and the canons of the same college, the parson and proprietors of the rectory and parish church of ——, in the city of London, of the one part; and [*lessees*], of &c., of the other part: WITNESSETH, that the said warden and canons, the parson and proprietors aforesaid, for and in consideration of the surrender of a former lease, bearing date, &c., and made between the warden and canons aforesaid, of the one part; and [*former lessee*], therein Parties. *Testatum.*

(*a*) The exceptions in this lease (there being no glebe land) reduce it substantially to a lease of the tithes.

OF A RECTORY.

Warden and canons demise to lessees.

described, of the other part; And also in consideration of the yearly rents and covenants hereinafter reserved and contained on the lessees' part to be paid, done, and performed, and for divers other good causes and considerations them thereunto especially moving, *Have* demised, granted, and to farm letten, And by these presents, for themselves and their successors, warden and canons of the said college, the parson and proprietors aforesaid, *Do* demise, &c. unto the said [*lessees*], their executors, administrators, and assigns, ALL THAT the rectory or parsonage of —— aforesaid, and all tithes, profits, commodities, emoluments, and hereditaments whatsoever, with their and every of their appurtenances, to the said rectory and parsonage appertaining or in anywise belonging, or accepted, reputed, or known as part, parcel, or member of the said rectory, or heretofore to the said rectory assigned, appointed, limited, united, or annexed; *Except* and always reserved unto the said warden and canons, the parson and proprietors aforesaid, and their successors and assigns, the mansion or parsonage house of the said rectory, and all houses, edifices, and buildings to the said parsonage house belonging or in anywise appertaining, and now or formerly used as part, parcel, or member of the said parsonage house (*b*); *And also* all the land and ground whereon the said mansion or parsonage house, or any mansion or parsonage house, or other building belonging to the said rectory, formerly stood; and all edifices, structures, and buildings now erected, built, or standing upon the said land or ground, together with all

The rectory.

Except parsonage house and other buildings.

And ground on which the same formerly stood.

Contracts for the letting of parsonage houses, &c. void.

(*b*) By stat. 43 Geo. 3, c. 84, s. 34, all contracts or agreements for the letting of houses of residence, or the buildings, gardens, orchards, and appurtenances necessary for the convenient occupation of the same, belonging to any benefice, donative, perpetual curacy, or parochial chapelry, to which houses of residence any spiritual persons shall be required, by order of the archbishop or bishop as aforesaid, to proceed and to reside therein; a copy of which order shall, immediately on the issuing thereof, be transmitted to one of the churchwardens of the parish, and be by him forthwith served on the occupier of such house or residence, or left at the same; and which such churchwarden is hereby required to serve accordingly; shall be null and void: and any person continuing to hold any such house of

tithes which ought to be paid at any time hereafter by the inhabitants and occupiers of the same parsonage house, or the lands and grounds where the said parsonage house formerly stood, or any house or room thereupon now erected or built: *And also except* and reserved unto the said warden and canons, the parson and proprietors aforesaid, and their successors, all such of the tithes as belong to the impropriators, of and for all those —— several messuages or tenements some time since erected and built for the said minor canons, situate in —— street, in the parish of —— aforesaid, for and during such time only as the said —— houses, or any of them, shall be inhabited by the said minor canons, or any of them, and no longer; *And also except* and reserved to the said warden and canons, the parson and proprietors aforesaid, and their successors and assigns, all the offerings and duties commonly called Easter Book, and the fees or duties payable to the minister, parson, or curate of the said parish for the time being, for marriages, christenings, churchings, and burials, of right belonging to the said warden and canons, and their successors, for, or upon, or by reason of the said rectory and parsonage, according to the several and respective rates and payments theretofore usual and accustomed, appearing in a table thereof made, and now or lately remaining in the vestry room of the parish church of ——; and also such offerings as shall be given to or for the minister, parson, or curate of the said parish of ——, for or at any funerals within the said parish: To HAVE AND TO HOLD the said rectory, tithes, and all other the premises hereinbefore demised, unto the said [*lessees*], their executors, administrators, and assigns, from the —— day of —— now instant, for and during and unto the full end and term of twenty-one years from thence next ensuing, and fully to be complete and ended; YIELDING AND

OF A RECTORY.

And the tithes in respect thereof.

And also the tithes of certain messuages.

And Easter offerings and surplice fees.

Habendum.

residence, or any such building, garden, orchard, or premises, after the day on which the said spiritual person shall be directed by the said order to reside in such house of residence, and after service of such copy as aforesaid, shall forfeit the sum of 40*s.* for every day he shall, without the permission of the archbishop or bishop in writing for that purpose obtained, wilfully continue to hold any such house, &c.

OF A RECTORY.

Reddendum.

PAYING therefore yearly, during the said term of twenty-one years, unto the said warden and canons, the parson and proprietors aforesaid, and their successors for the time being, or to their assigns, the clear yearly rent or sum of £—— of lawful money of Great Britain, quarterly, without any deduction or abatement whatsoever, for or in respect of the land-tax or any other taxes, rates, or assessments whatsoever, at and upon the several days and times following, that is to say—on the 7th day of April, the 7th day of July, the 7th day of October, and the 7th day of January, in each and every year during the term hereby granted, or within twenty-one days after every of the said days, by even and equal portions, the first quarterly payment of the said yearly rent to begin and be made on the 7th day of April next ensuing, or within twenty-one days then next following; *And also,* YIELDING AND PAYING therefore yearly, during the said term of twenty-one years, unto the said warden and canons, parson and proprietors aforesaid, and their successors for the time being, or to their assigns, the further clear yearly rent or sum of £——, of like lawful money of Great Britain, being the amount of the land-tax redeemed by the said warden and canons, payable at and upon the same days and times of payment, in every year, as the same was payable before the redemption thereof; *And also,* YIELDING AND PAYING and delivering therefore yearly, during the said term, unto the said warden and canons, the parson and proprietors aforesaid, and to their successors for the time being, or to their assigns, two good fat and live capons, or the sum of six shillings and eightpence in money, on the 10th day of June in every year during the said term. AND if it shall happen, that the said yearly rents of £——, and [*land-tax-rent*], or either of them, be behind and unpaid in part or in all, contrary to the form above mentioned, at any time during the said term, the same being publicly and openly demanded by one of the minor canons aforesaid for the time being, or by their certain attorney, agent, or rent-gatherer for the time being, that then and from thenceforth it shall and may be lawful to and for the said warden and canons, parson and proprietors aforesaid, for the time being, their successors and assigns, into and upon the said hereby demised premises, or

Further *reddendum* of land-tax.

Further *reddendum* of two fat capons, or 6*s.* 8*d.*

Proviso for re-entry on non-payment of rent.

any part thereof in the name of the whole, wholly to re-enter, and the same to have again, retain, repossess, and enjoy, as in their or any of their first and former estate, and then and from thenceforth this present lease and demise to cease and be absolutely void and of none effect, these presents, or any thing hereinbefore contained to the contrary thereof in anywise notwithstanding. AND the said [*lessees*], for themselves, their executors, administrators and assigns, *Do* and each of them *Doth* covenant and agree with the said warden and canons, the parson or proprietors aforesaid, and their successors, by these presents, That they the said [*lessees*], or one of them, or the heirs, executors, or administrators of one of them, shall and will, from time to time during the said term of twenty-one years, pay and render unto the said warden and canons, the parson and proprietors aforesaid, and their successors for the time being, or to their assigns, the said several yearly rents or reservations hereinbefore reserved and contained, at the several days or times, and in the manner hereinbefore expressed concerning the same, according to the true intent and meaning of these presents; And that it shall be lawful to and for the said warden and canons for the time being, or the major part of them, from time to time during the same term of twenty-one years, to nominate, elect, and choose the curate or curates for officiating at divine service of or for the same parish, as the same shall happen to be void, from among the minor canons of the said college; and that the said curate or curates, so chosen or to be chosen and nominated by them or the major part of them as aforesaid, shall or may enjoy the same without the let, interruption, or disturbance of the said [*lessees*], their executors, administrators or assigns, or any of them; *And further*, that they, the said [*lessees*], their executors, administrators, or assigns, shall, during the said term hereby granted, satisfy and pay the curate or curates of the said parish church for the time being, the yearly stipend or allowance of £——, at or upon the four quarterly days of payment hereinbefore mentioned, in every year during the said term, or within twenty-one days next after every of the said days of payment, by even and equal portions: *And further*, that it shall be lawful for the said warden and canons for the time

Covenants by lessees—

To pay rent.

That lessors may elect curate from among the minor canons.

Lessees to pay him a certain stipend.

That lessors may elect the parish clerk.

OF A RECTORY.

being, or the major part of them, from time to time during the said term of twenty-one years hereby granted, to nominate, elect, and choose, and place any meet, able, and sufficient man to be and serve in the office, room, or place of parish clerk, without any let, interruption, or denial of or by the said [*lessees*], their executors, administrators, or assigns, or by any other person or persons by or through their or any of their means, act, or procurement. *(Covenant by warden and canons for themselves and their successors, for quiet enjoyment).* IN WITNESS, &c.

THEATRICAL FREE ADMISSION TICKET.

GRANT *or* LEASE *of a* SILVER *or* FREE ADMISSION TICKET *to the* KING'S THEATRE *or* OPERA HOUSE, *for sixteen Years.*

Parties.

Recitals.

THIS INDENTURE, made &c., BETWEEN [*lessor*], of the King's Theatre or Opera House, in the Haymarket, in the liberty of the city of Westminster, in the county of Middlesex, Esq., of the one part; and [*lessee*], of &c., of the other part. WHEREAS the said [*lessor*] is the sole proprietor or owner of the Opera House or theatre, called the King's Theatre, in the Haymarket aforesaid, and of the newly built concert room adjoining thereto, and of the several messuages, rooms, erections, and buildings also adjoining or belonging thereto, or held therewith, and of the licence, privilege, scenes, wardrobe, utensils, and other things appertaining thereto, and used for the performance of operas and other public entertainments, and of all benefit, profit, and advantage to arise thereby. AND WHEREAS the said [*lessee*] hath contracted with the said [*lessor*] for the absolute purchase of one silver ticket of admission to the said theatre or Opera House, which shall entitle the bearer thereof to be admitted gratis into any part of the said theatre, (except as hereinafter mentioned), to be present at and see every theatrical performance, or other public entertainment which shall be exhibited there, together with the additional privilege of being ad-

That lessor is proprietor of Opera House.

Contract for purchase of Opera ticket.

mitted gratis to concerts intended to be established in the new room belonging to the said theatre, under the name and title of the Opera Concert, (save and except the opera of antient music, and the benefit concerts which shall or may be performed in the said new room), for and during the term of sixteen years or seasons, to be computed from the day of the date of these presents, at or for the price or sum of £——. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and for and in consideration of the sum of £——, of lawful money of Great Britain, to the said [*lessor*] in hand paid by the said [*lessee*], at and immediately before the execution of these presents, (the receipt whereof he the said [*lessor*] doth hereby acknowledge, and from the same and every part thereof doth discharge the said [*lessee*], his executors, administrators, and assigns, for ever, He, the said [*lessor*], *Hath* given, granted, bargained, and sold, and by these presents *Doth* give, &c., unto the said [*lessee*], his executors, administrators, and assigns, ONE SILVER TICKET OF ADMISSION into the said Opera House or theatre and every part thereof, (except the boxes or other places which now are, or from time to time during the said term hereby granted shall be, let to or occupied by the persons who now are or shall become subscribers to the Opera, and the boxes set apart or reserved for the use of the proprietors or their assigns), and doth give and grant to the bearer thereof full and free licence, liberty, and privilege, to be present at and see all the operas, exhibitions, and other public entertainments there to be had, together with the licence, liberty, and privilege, of free admission to the aforesaid concert, intended in future to be established in the said new room, under the name and title of the Opera Concert, (except the concert of antient music and benefit concerts to be performed therein), for and during the term of sixteen years, or sixteen seasons, to be computed from the day of the date of these presents, and fully to be complete and ended, and which ticket is already made and engraved in the following manner, that is to say, on the one side a crown in the centre, and round it, "King's Theatre, for sixteen years, from ——," and on the reverse, "General ticket of admission, No —." TO HAVE AND TO HOLD the said ticket, with such

THEATRICAL FREE ADMISSION TICKET.

Testatum.

Lessor grants silver ticket of admission.

Habendum.

THEATRICAL FREE ADMISSION TICKET.

free licence, liberty, and privilege as aforesaid, unto the said [*lessee*], his executors, administrators, and assigns, for the full end and term of sixteen years or seasons, as aforesaid, and with full power to sell and dispose of the same at his and their free will and pleasure. And the said [*lessor*] doth for himself, his heirs, executors, administrators, and assigns, covenant with the said [*lessee*], his executors, administrators, and assigns, that he the said [*lessor*] hath in himself good right, full power, and lawful and absolute authority to give, grant, bargain, and sell such ticket, with such right, title, and privilege of free admission as aforesaid; And that he will fully and freely warrant to the said [*lessee*], his executors, administrators, and assigns, and the holder of the said ticket, the full and free use and enjoyment of such right and privilege for and during all the said term of sixteen years or seasons so granted as aforesaid, according to the true intent and meaning of these presents; *And further*, that if the said silver ticket shall be at any time sold or disposed of, and so often as the same shall happen from time to time, the purchaser shall and may have his name engraved thereon in the place and stead of the last holder thereof, in case he shall think proper, or shall and may, upon the surrendering and delivering up the said ticket so purchased, be entitled to a new one or other to be made out in his or her own name, upon his or her paying the sum of one guinea for each new or other ticket so to be made out or had in lieu of what shall be so surrendered and delivered up as aforesaid; *And further*, for defending and preserving the rights and privileges of the said [*lessee*], his executors, administrators, and assigns, against all accidents by fire, pickpockets, or otherwise, whereby the said silver ticket now given and granted to him as aforesaid may be lost, missing, or rendered useless to him or them, that, upon notice given in writing to the treasurer or at the office of the said theatre, of any such loss or accident, whereby the owner or proprietor for the time being of such ticket is or shall be deprived of the use thereof, and authority given to stop such lost or missing ticket at the doors of the said theatre, and to refuse admission thereof to the bearer, if tendered for admission, the real owner or proprietor for the time being

Covenants by lessor for title and quiet enjoyment.

In case of sale, purchaser may have his name engraved,

Or have a new ticket.

In case of loss of ticket, lessee to be entitled to personal admission for a month.

shall have and be entitled to one personal admission for the term of one month from the date of such notice, for such ticket so lost, such personal admission being for himself, or for such person or persons as he shall in such notice nominate and appoint for that purpose, such owner or proprietor and nominee being first produced and shewn at the said office: And in case such lost or missing ticket shall not be produced or presented at the said theatre, within the month so allowed for such free personal admission, such owner or proprietor for the time being, or his appointee, shall have and be entitled to a new ticket, to be made out in his or her own name, for all the residue of the term hereby granted, and with all the privileges and advantages annexed to the said lost or missing ticket, on paying for the same the sum of one guinea as aforesaid, and surrendering all right and interest under such former ticket, and authorizing the stopping and retaining the same, if at any time thereafter it shall be shewn or presented at the doors of the said theatre. IN WITNESS, &c.

THEATRICAL FREE ADMISSION TICKET.

And if the ticket shall not have been then produced, lessee to be entitled to a new ticket.

What is a "usual and common" covenant in a lease.

The Editor avails himself of this opportunity to notice a decision, the report of which is just published, bearing upon the much litigated question—What are to be considered *usual* covenants in a lease. (*Vide ante*, Vol. 1, p. 23, *et seq.*). A. agreed to purchase of B. the lease of a public-house, which was described as being let at a certain net annual rent, under common and usual covenants. It appeared that the lease contained a covenant by the tenant to pay the land-tax, sewer's rate, and all taxes, and a proviso for re-entry if any other business than that of a victualler should be carried on in the house:—The Court held, that the covenant to pay taxes merely operated to give a "net" rent to the landlord; and that, as it appeared by the evidence that six out of ten public-house leases contained the proviso in question, it was a "usual and common" clause. Mr. Justice *Bayley* observed, that it must be remembered, that this was a bargain for an assignment of a lease, not for the original grant of a lease. *Bennet* v. *Womack*, 7 Barn. & Cress. 627.

LETTER OF ATTORNEY.

Letters of attorney revocable by act of the constituent, or by death.

A LETTER OF ATTORNEY is an instrument by which a person delegates to another an authority to do certain acts on his behalf. The authority conferred by a letter of attorney is revocable either by the act of the principal or by his death. An exception, however, to the revoking power in the constituent party has been thought to exist where the instrument forms part of a security for money; and upon this principle, in *Walsh* v. *Whitcomb*, 2 Esp. N. P. 565, where A. assigned all his effects to B., in trust for the benefit of his creditors, and executed a power of attorney to B., authorizing him to receive his debts and give discharges, and also to appoint a substitute; and B., in pursuance of the power of substitution, executed an authority to H., who applied for and received a debt due from the defendant, who was one of A.'s debtors; and it afterwards appeared, that another power of attorney had been executed by A., the question was—Whether this power revoked the former so as to invalidate the payment made by the defendant to H.; and Lord *Kenyon* held, that it did not: for "it was part of the security for the payment of the creditors, *and was therefore by law not revocable.*" His Lordship observed, that, where a power of attorney was made to levy a fine, as part of a security, it was held not to be revocable. And Lord *Ellenborough*, on several occasions, referred to it as settled law, that a power of attorney coupled with an interest could not be revoked. See 4 Camp. 274, 2 Stark. 51.

Whether revocable where given as a security.

The soundness of the decision in *Walsh* v. *Whitcombe* has, however, been much questioned, on the ground that it is impossible to impart an irrevocable character to an instrument of this kind, whatever be its purpose and object. *Ex parte Mure*, 1 Cox, 72. But the doctrine has been confirmed in several recent adjudications. Thus, in the case of *Hodgson* v. *Anderson*, 3 Barn. & Cress. 354, it was held that a creditor, who had once given an order for the payment of his debt to a third person, had no right to revoke that order, the person authorized to receive it having entered into an undertaking to pay the debt according to the authority. So, in the case of *Gaussen* v. *Morton*, 1 Barn. & Ald. 731, where A., being indebted to B., and being seised of certain copyholds, executed a power of attorney authorizing B. to sell and surrender the premises to the use of any purchaser, and empowering him to receive the purchase-money; under

which power B. sold the premises by auction; but, before any surrender was made to the purchaser, A. executed a deed-poll revoking the power, and gave notice thereof to the steward, who nevertheless admitted the purchaser on B.'s surrender: and it was held, that this admission was good, on the ground that A. could not revoke the power of attorney given to B. to sell and surrender, *it being a power coupled with an interest*, inasmuch as B. was to apply the proceeds in liquidation of his debt.

It is clear, too, that where a power has been given for a valuable consideration, a Court of Equity will not permit it to be revoked. See *Bromley* v. *Holland*, 7 Ves. 28. When Lord *Eldon* advanced this position, he certainly did not contemplate the possibility of a power of attorney being an irrevocable instrument, according to the doctrine of the cases just stated, which excludes the necessity of equitable interference.

Act when to be considered as done.

An authority of course can only be revoked before the authorized act has been done. Hence sometimes arises the question, in what particular state of a transaction it is to be considered as consummated, so as to exclude the subsequent revocation of the power. On this point, it has been held, that the authority of a broker employed to effect an insurance may be revoked after the underwriters have signed the slip, but before they have actually subscribed the policy, they not being *legally* bound until the policy was so subscribed. *Warwick* v. *Slade*, 3 Camp. 127.

And where, on the dissolution of a partnership, the partners empowered an agent to receive the partnership debts, of which notice was given to a debtor to the firm, who thereupon promised payment to the agent, it was held, that this authority might nevertheless be countermanded by one of the partners before payment. *Bristow* v. *Taylor*, 2 Stark. 50.

Effect upon powers of death of principal.

A power of attorney may also be determined by the death of the party executing it; for, as its effect is merely to substitute another in his room, this substitution can only continue while there is a principal to be represented.

Thus, where A., a sea captain, made a letter of attorney "irrevocable" to B., to receive such wages and pay as should thereafter become due to him, it was held, that, after the decease of A., the attorney (who it seems was a creditor of A.) had no claim to have an account and payment of the wages, but they were to be administered in a general course of administration. *Mitchell* v. *Eades*, Pre. Ch. 125.

So, in a recent case, Sir *W. Grant*, M. R., held, that a power of attorney given to certain bankers to receive a sum of money, and which was not received until after the constituent's death, could not be retained by them in satisfaction of a debt; though parol evidence was given of declarations by the executing party, that it was to enable them to apply the money to their debt; but which, the Master of the Rolls said, "was not enough to operate as an appropriation of the money, or to prevent it from becoming part of the testator's assets." *Lepard* v. *Vernon*, 2 Ves. & Bea. 51.

LETTER OF ATTORNEY.

And this rule extends to acts done by the attorney in ignorance of the event which has determined his authority. Thus, in a late case, where A., being owner of three fourth parts of a ship, gave a power of attorney to B., to whom he was largely indebted, to sell his share. He afterwards sailed under convoy to Bermuda, in a ship which parted company on the 8th of March, 1814, in a storm, and was never afterwards heard of. On the 8th of June, B. sold A.'s interest under the power, and indorsed the register. Lord *Ellenborough* held, that if the Jury were of opinion that A. perished in the storm, the administrator of A. was entitled to recover from the purchaser his share in the vessel. "A power coupled with an interest," said his Lordship, "cannot be revoked by the person granting it, but it is necessarily revoked by his death. How can a valid act be done in the name of a dead man?" *Watson* v. *King*, 4 Camp. 272; *S. C.* 1 Stark. 121.

As to securities by powers of attorney.

It will be obvious, from the preceding cases, that a security for money should never be made by a power of attorney alone, but should always be (as it usually is) accompanied by an assignment; though it is to be observed that in equity any instrument which demonstrates the intention of the parties will amount to a charge.

Power includes all acts incidental to the act to be performed.

Where a power authorizes a party to do a certain act, it impliedly includes an authority to do whatever is incident to that act: Thus, a power to demand, receive, and recover a debt, authorizes the attorney to arrest the debtor. *Randall* v. *Harvey*, 2 Roll. Rep. 390.

A power to receive money does not authorize the negotiation of bills given in payment.

But a power to receive money and give discharges does not authorize the attorney to indorse and negotiate in the name of his principal bills received in payment. Thus, where, on the dissolution of a partnership between A., B., and C., a power was given to A. to receive and discharge all debts owing to and demands upon the partnership; he drew a bill upon one of the debtors of the partnership, and afterwards on behalf of himself, and C. and D. indorsed it to the plaintiff, who discounted it. It was held, that the indorsee could not sustain an action against A., B., and C., A. not being authorized to indorse the bill; and the fact that the proceeds were applied by him to pay a debt of the partnership, did not enable the indorsee to recover for money paid to the use of the three defendants. *Kilgour* v. *Finlyson*, 1 H. Bl. 155. And in a recent case it was held, that where A. executed a power of attorney authorizing B. to receive all sums of money due to him on any bill, &c. B. was not empowered to indorse bills, and that, therefore, the defendants, who had paid bills to persons to whom B. had indorsed them, were liable to pay the amount again to the administrator of A. *Murray* v. The *East India Company*, 5 Barn. & Ald. 204; see also *Hay* v. *Goldsmid*, 2 Smith, 79. And evidence of the usage of attornies acting under powers of a particular kind, as to receive bills drawn on the commissioners of the navy, is not admissible, for the purpose of giving a larger construction to the terms of such a power *Hogg* v. *Snaith*, 1 Taunt. 347.

General words not in general operative to enlarge the effect of a power.

The general words which are frequently thrown in at the end of powers, have not commonly the effect of enlarging their operation; such expressions, however comprehensive, being construed as having relation to the particular acts enumerated in the preceding clauses. Thus, where A. executed a power, authorizing C. and D. to receive all sums of money due to him on any account whatsoever, and, on non-payment, to use means for the recovery thereof, " and to transact all business;" it was held, that this did not authorize the attornies to indorse a bill drawn in favour of A. as executor; Lord *Ellenborough* observing, that the general words were to be construed with reference to the subject matter, namely, as meaning " all business" *incident to the receiving of the money*. *Hay* v. *Goldsmid*, 2 Smith, 79; *S. C.* cit. 1 Taunt. 349. So, in a late case, where A. who carried on business individually, and also in partnership, went abroad, having previously executed two powers of attorney; by the first of which, he authorized his wife, and C. and D. (who were two of his partners), jointly and severally, for him and in his name, and to his use, to sue for and get in monies, and settle accounts, &c. indorse, negotiate, and discount, or acquit and discharge bills which should be payable to him, to sell ships, buy and sell goods, &c. and generally for him and in his name, &c. to make, execute, transact, and perform all such other acts as should be requisite in and about the premises, *and all other his affairs and concerns*, as he might or could do if personally present. By the other power of attorney, he authorized his wife alone to do certain acts affecting his real and personal estate, " and also to pay and accept such bill or bills of exchange as should be drawn or charged on him by his agents or correspondents, as occasion should require, *and generally to do, negotiate, and transact his business*, as fully and effectually as if he were present and acting therein. During A.'s absence, C., (who acted as his agent), in order to raise money to pay some creditors of the partnership, drew a bill on A., which was accepted by his wife by procuration. In an action brought against A. upon this bill, it was held, *first*, that the first power, notwithstanding the generality of the expressions, did not extend to the acceptance of bills; *Secondly*, that the second power was confined to bills drawn on the plaintiff in his individual capacity; for, as to the partnership transactions, no such power was necessary, as the other partners might bind the firm by their acceptance; and that the bill in question was not drawn by C. in his capacity of A.'s agent; and, *Thirdly*, (in answer to the argument that an indorsee was not bound to inquire into the propriety of an acceptance made by a person authorized to accept by procuration), that the plaintiff, who had discounted the bill on the faith of the wife's acceptance, was bound to ascertain that the act was authorized by the power. *Attwood* v. *Munnings*, 7 Barn. & Cress. 278; 1 Man. & Ryl. 66. In another recent case, a question arose as to the authority of an agent to raise money, under the following circumstances:—A mercantile firm in London sent an agent to Peru, for the purpose of taking and working

LETTER OF ATTORNEY.

mines, giving him a letter of credit, or rather an authority to him to draw upon the firm for 10,000*l.*, accompanied by a power of attorney authorizing the agent to enter into and execute contracts for the obtaining any grant or lease of mines, or for the purchase of any ore, or of the right to work mines, or otherwise concerning the management thereof, and to engage workmen, &c. The agent raised a larger sum than 10,000*l.* on the letter of credit, and afterwards obtained from the plaintiffs a sum of money for the purpose of purchasing and working mines, and other general purposes, on the defendants' account, giving them bills on the defendants, for which the present action was brought. The agent did not shew to the plaintiffs the letter of credit, on which there was no indorsement indicating that any money had been raised on it, nor were they informed of this fact, and the agent did not remember shewing them the power of attorney. It was contended that the agent, in regard to the loan in question, had exceeded his authority, the extent of which it was the defendants' duty to have ascertained. The letter of credit, it was argued, restrained and limited the general terms of the power. The Court, however, held, that the plaintiff was entitled to recover; that the authority to obtain a grant of mines was to be construed as an authority to purchase them, to which the power of raising money for the purpose of completing such purchases was necessarily incident; and the letter authorizing the agent to draw for 10,000*l.* being not a letter of credit properly so called, *i. e.* a letter addressed to the persons to make the advances, but a letter addressed to the agent himself; so that the defendants had no means of knowing that the 10,000*l.* had been raised. *Withington* v. *Herring*, 3 Moore & Payne, 30.

Power to bind by deed should be under hand and seal.

Powers of attorney are usually executed under the hand and seal of the party; and where they contain an authority to the attorney to bind the principal by *deed*, it is essential that they should be so executed. *White* v. *Cuyler*, 6 D. & E. 176; *Horsley* v. *Bush*, cit. 7 D. & E. 209; *Berkeley* v. *Hardy*, 6 Barn. & Cress. 355; *S. C.* 8 Dowl. & Ryl. 102.

As to powers to partners in trade.

Such powers are frequently given by one absent partner to another, as it is a settled and well-known rule that one partner cannot, without such special authority, bind another by deed. Thus, in *Harrison* v. *Jackson*, 7 D. & E. 207, where the plaintiff, in an action of covenant, declared upon an instrument under seal, executed by A. (one of the defendants) for himself and the other two defendants, though it appeared that it was a partnership transaction, and a valuable consideration had been received by the defendants as partners; it was held that the action did not lie. See also *Steiglitz* v. *Egginton*, Holt, 141. In *Ball* v. *Dunsterville*, 4 D. & E. 313, indeed, a bill of sale executed by one partner on behalf of himself and another, was held to be binding on both; but the act of delivery was made in the presence of the partner, and the Court seems to have treated it as the execution of both.

It was contended, in *Harrison* v. *Jackson*, that the partnership being constituted by writing under seal, gave authority to each to bind the others

by deed; but Lord *Kenyon* truly observed, that a general partnership agreement, though under seal, does not authorize the partners to execute deeds for each other, unless a particular power be given for this purpose. See also *Williams* v. *Walsby*, 4 Esp. 220. Of course, a power given to an individual partner in a firm communicates no authority to his partner. *Edmiston* v. *Wright*, 1 Camp. 88.

LETTER OF ATTORNEY.

The reader will find much useful information respecting the law of principal and agent, in Paley's Law of Principal and Agent, (Gow's Ed.), though the points are, in general, rather too shortly stated.

LETTER *of* ATTORNEY *to* RECEIVE *a* DEBT *in the* WEST INDIES.

TO RECEIVE A DEBT IN THE WEST-INDIES.

KNOW ALL MEN BY THESE PRESENTS, that I [*constituent*], of Cheapside, in the city of London, linen-merchant, [*Have* made, constituted, and appointed, and] by these presents *Do* make, constitute, and appoint [*attorney*], of Kingston, in the island of Jamaica, gentleman, my true and lawful attorney, for me and in my name, or otherwise, and for my use, to ask, demand, and receive, and, if necessary, sue for and recover all and every sum and sums of money whatsoever that is or are now due and owing to me, of and from [*debtor*], late of the city of London, but now of Kingston aforesaid, esquire (*a*); and on receipt or payment

(*a*) Or the debt may be described specifically as—

Variation, according to the nature of debt.

"All that debt or sum of £—— now due and owing to me from [*debtor*], of &c., for goods sold and delivered by me to the said [*debtor*], as appears by the bill or account hereunto annexed signed by me."

Or if the debt arose on a bill of exchange—

"All and every the sum and sums of money due and owing to me by virtue of the bill of exchange hereunto annexed, dated the —— day of ——, drawn by me upon, and accepted by the said [*debtor*], for the sum of ——, payable —— months after the date thereof, including as well the principal money mentioned in the said bill, as the interest,

TO RECEIVE A DEBT IN THE WEST-INDIES.

thereof, or of any part thereof, for me and in my name, acquittances or other sufficient discharges for the same to make, sign, and deliver, and to do all other lawful acts and things in and about the premises, as effectually as I could do the same if I were personally present; and all and whatsoever the said [*attorney*] shall lawfully do in the premises, I the above-named [*constituent*] hereby agree to ratify and confirm. IN WITNESS, &c.

SIGNED, SEALED, and DELIVERED by the said [*constituent*], in the presence of [*Two Witnesses*]. } [*Constituent.*] (L. S.)

MAYOR'S CERTIFICATE TO ACCOMPANY POWER.

MAYOR'S CERTIFICATE *under the Common Seal of the City of* LONDON, *and* AFFIDAVIT, *to accompany the preceding* LETTER *of* ATTORNEY.

TO ALL TO WHOM THESE PRESENTS shall come, I [*Lord Mayor*], Lord Mayor of the city of London, in pursuance of an act of Parliament made and passed in the fifth year of the reign of our late Sovereign Lord King George the Second, intituled "An Act for the more easy recovery of debts in his Majesty's plantations and colonies in America (*a*);" do hereby certify that [A. B.], of Cheapside, in

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commission, and all other charges and expenses which shall have become due thereon, or have been incurred by the non-payment thereof."

Stat. 5 Geo. 2, c. 7. In suits depending in plantations to which any person residing in Great Britain is a party, proof to be received by affidavit made before any Mayor, &c.

(*a*) This Act provides, that in any action or suit then depending or thereafter to be brought in any Court of law or equity in any of the said plantations, for or relating to any debt or account wherein any person residing in Great Britain shall be a party, it shall be lawful for the plaintiff or defendant, and also for any witness to be examined or made use of in such action or suit, to verify or prove any matter or thing by affidavit or affidavits in writing upon oath, or in case the person making such affidavit be one of the people called quakers, then upon his or her solemn affirmation, made *before any Mayor or other chief magistrate of the city, borough, or town corporate in Great Britain*, where, or near to which, the person making such affidavit or affirmation shall reside, *and certified and transmitted under the common seal of such city, borough, or town corporate, or the seal of the office of such Mayor or other chief magistrate;* and every

And to be of the

the said city of London, clerk to [*creditor*], of the same place, linen-merchant, being a person well known and worthy of good credit, did by solemn oath, which he took upon the Holy Evangelists of Almighty God, solemnly declare, testify, and depose to be true, the several matters and things contained in the affidavit hereunto annexed. TO RECEIVE A DEBT IN THE WEST-INDIES.

In faith and testimony whereof, I the said Lord Mayor have caused the seal of the office of Mayoralty of the said city of London to be hereunto put and affixed, and the bill or account, and deed poll or letter of attorney mentioned in the said affidavit, to be also hereunto annexed. Dated in London, the —— day of ——, in the ninth year of the reign of our Sovereign Lord George the Fourth, by the grace of God of the United Kingdom of Great Britain and Ireland King, Defender of the Faith, and in the year of our Lord ——.

[*Mayoralty Seal*].

[A. B.], of Cheapside, in the city of London, clerk to [*creditor*], of the same place, linen-merchant, maketh oath that the several goods and articles mentioned in the bill or account hereunto annexed, signed by the said [*creditor*], were, to the knowledge of this deponent, supplied and furnished by the said [*creditor*] to [*debtor*] (*b*), now of Kings- AFFIDAVIT TO ACCOMPANY POWER.

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affidavit or affirmation so made, certified, and transmitted, shall, in all such actions and suits, be allowed to be of the same force and effect, as if the person or persons making the same upon oath or solemn affirmation as aforesaid, had appeared and sworn or affirmed the matters contained in such affidavit or affirmation *vivâ voce* in open Court, or upon a commission issued for the examination of witnesses or of any party in such action or suit respectively, *provided that in every such affidavit and affirmation there shall be expressed the addition of the party making such affidavit or affirmation, and the particular place of his or her abode.* same force as if the witness deposed *vivâ voce*.

Sect. 2, Enables the king to prove his debts in like manner.

Sect. 3, Subjects persons swearing falsely to the penalties of perjury.

Sect. 4, Makes liable houses, lands, negroes, and other real estates in the plantations, to simple contract debts. (*But repealed as to negroes by stat.* 37 *Geo.* 3, *c.* 119).

(*b*) Sometimes the deponent cannot speak to the fact of the goods hav- Variations in af-

TO RECEIVE A DEBT IN THE WEST-INDIES.

ton in the island of Jamaica, but late of the city of London, esquire, by the order, and at the request of the said

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fidavit, according to the nature of the debt.

ing been supplied, but merely states that the account agrees with the books, thus:—

"That the bill or account hereunto annexed, signed by the said [*creditor*], is a just and true transcript or copy of a bill or account as appearing in the books of the said [*creditor*]."

If the account has been delivered by the person making the affidavit to the debtor, add—

"And this deponent further saith, that he did, on the —— day of ——, deliver a copy of the said account to [*debtor*] at the house of ——, in the said city of London, and he the said [*debtor*] thereupon promised that he would call on the said [*creditor*] and pay the same before he left London," *(or otherwise, as the case may be.)*

As to nature of affidavit to verify debt.

This affidavit should correspond as nearly as can be with the evidence which would be requisite in an action brought in a Court of justice in England for the recovery of the debt, though debts are recovered in the colonies upon depositions which fall very short of this; for, it seems to be considered sufficient if the deponent swears simply to the fact, that the accompanying account is a true copy of the account as appearing in the books of the creditor, and that he believes the debt to be still owing to him. This, it is obvious, is equivalent to receiving the deposition of the creditor himself, which indeed is received in some of the colonies, as authorized by the statute of George the Second; but this construction of the act has not obtained universally, for in Barbadoes a different rule prevails. The non-admission of the affidavit of the party himself in this island is referred to in a useful collection of the colonial laws lately published, (See Howard's Laws of the Colonies, Introd. p. xv.), as a direct infringement of the statute in question; but the point, it is conceived, is not so clear upon the language of the act as this author supposes; for the statute merely provides (after directing that the affidavit of the plaintiff or defendant, or of any witness, shall be received,) that such affidavit shall be of the same force as if the person making the same had sworn to the matters in Court, &c. It might seem, therefore, that the Legislature did not intend to interfere with the rules of evidence, farther than by making the affidavit equivalent to a *vivâ voce* examination, leaving those rules to determine the admissibility of the evidence in other respects.

As to powers to

Where a power of attorney is transmitted to the East Indies to recover

TO RECEIVE A DEBT IN THE WEST-INDIES.

[*debtor*]; and this deponent further saith, that he verily believes that the sum of £——, the amount of the said bill or account, is now justly due and owing from the said [*debtor*] to the said [*creditor*]. And this deponent further saith, that, on the —— day of ——, he this deponent, and [*the other attesting witness*], of &c., were present, and did see the said [*creditor*] duly sign, seal, and as his act and deed deliver, the letter of attorney bearing date the —— day of ——, hereunto also annexed, and that the name [*creditor's signature*] appearing to be thereunto subscribed is of the proper handwriting of the said [*creditor*], and that the names —— and —— thereunto also subscribed as witnesses attesting the execution thereof, are of the respective proper handwriting of this deponent and the said [*other witness*] (*c*).

Sworn at the Guildhall, London, the ——
day of ——, 18—, before me,
——— Mayor.

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recover debts in the East Indies.

a debt due to a person resident in London, it should be accompanied by an affidavit by the creditor, similar to that usually made to hold to bail, and verifying an annexed account; also an affidavit by some third person, as in the present case: which affidavits should be sworn before the Mayor, whose signature to the respective jurats should be certified by a notary public, and then the assistant secretary of the company certifies that the notary public who has signed the act is a public notary practising in London. For these forms, see Chitty's Commercial Law, Vol. 4, p. 30.

(*c*) In order to avoid the necessity of having more than one affidavit, the person deposing to the fact of the debt being due should be one of the attesting witnesses to the power of attorney, and should make the affidavit of its execution.

TO RECEIVE MONIES PAYABLE UNDER AN ORDER IN CHANCERY IN JAMAICA.

LETTER *of* ATTORNEY (*with* AFFIDAVIT *and* MAYOR'S CERTIFICATE,) *by a Plaintiff in a Cause in the* COURT *of* CHANCERY, *in* JAMAICA, *to a Person there, to* RECEIVE *an* ANNUAL SUM *of* MONEY, *payable by an* ORDER *of* COURT; *and generally to* REPRESENT *him in the* CAUSE.

ISLAND OF JAMAICA.

In Chancery.

[A. B.] and [C. D.] . Plaintiffs.
and
[E. F.] . . . . . Defendant.

TO ALL TO WHOM THESE PRESENTS SHALL COME, [C. D.], of &c., one of the above-named plaintiffs, *Sends Greeting:* WHEREAS, by an order made in this cause, bearing date on or about the —— day of ——, it was ordered, that the receiver or receivers then appointed, and the receiver or receivers for the time being of the lands and plantations in the pleadings mentioned, and the slaves, stock, and appurtenants thereon and thereunto belonging, should, by and out of the rents and profits of a certain plantation, called ———, being in the island of Jamaica aforesaid, thereinbefore mentioned, after payment of the annual contingencies thereof, and also of a certain annuity of 80*l.* to ——, in the said order named, pay annually into the hands of the said [*constituent*], in Great Britain, free from all charges for commission on bills of exchange or otherwise, the sum of £—— sterling, as and for the annual dividend on the sum of £——, capital stock in the Three *per cent.* Consolidated Bank Annuities, by equal half yearly payments, to commence from the month of January then last. NOW THESE PRESENTS WIT-

Recital of order of Court.

Testatum.

TO RECEIVE MONIES PAYABLE UNDER AN ORDER IN CHANCERY IN JAMAICA.

NESS, that the said [*constituent*] *Doth* hereby nominate, constitute, and appoint [*attorney*], of Kingston, in the said Island of Jamaica, esquire, to be the attorney and agent of the said [*constituent*], for him and in his name, or otherwise, and on his behalf, to ask, demand, sue for, recover, and receive, of and from the person or persons who now is or are, or from time to time hereafter shall be, the receiver or receivers for the time being of the said lands, plantations, and hereditaments hereinbefore mentioned or referred to, and of and from all and every other person or persons whom it may concern, the said annual sum of £——, directed by the said recited order to be paid to the said [*constituent*], as hereinbefore mentioned, including as well the arrears of the said annual sum now due and payable, as the future and accruing payments thereof hereafter to become due; and all other monies, which, by virtue of any order now made, or hereafter to be made in the said cause, are or shall be payable to the said [*constituent*]: And on the payment or receipt of the said monies, or any part thereof, to give effectual receipts and discharges for the same; and also for him the said [*constituent*], and in his name, and on his part and behalf to file and present or consent to and concur in any petition or petitions, that may be deemed expedient, not only touching the receipt or recovery of the said monies hereinbefore mentioned, or any part thereof, but also for any other purpose or purposes arising in or connected with the said cause, and generally to take and adopt all and every such proceedings and proceeding, and do and perform all and every such acts and act, deeds and deed, in and about the conduct, management, prosecution, suspension, or determination of the said cause, or otherwise in relation thereunto, as he the said [*attorney*] shall think proper, as fully and effectually to all intents and purposes as the said [*constituent*] might or could do if personally present; And also to substitute and appoint any person or persons to act under or in the place of the said [*attorney*] in all or any of the matters aforesaid, and every such substitution at pleasure to revoke; the said [*constituent*] hereby agreeing to ratify and confirm whatsoever the said [*attorney*] or his substitute or substitutes shall lawfully do or cause to be done in or about the premises, by

REVOCATION OF LETTER OF ATTORNEY.

virtue of these presents; And the said [*constituent*] doth hereby revoke and make void every other power or authority at any time heretofore executed or given by him touching or concerning the matters aforesaid, or any of them, but so, nevertheless, that this revocation shall not impeach or affect the validity of any act or acts which shall be done by virtue thereof, before notice shall have been given to the person or persons doing the same of the execution of these presents (*a*). In witness whereof the said

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(*a*) The execution of a power of attorney would be a revocation of any previously existing power relating to the same matters, unless an intention could be collected, that the attornies named in both powers should act conjunctively, which would, it is conceived, require a special indication of intention. Where the object of the instrument is simply to revoke an existing power, it may be framed as follows:—

DEED OF REVOCATION OF A LETTER OF ATTORNEY.

TO ALL TO WHOM these presents shall come, [A. B.], of &c., *Sends Greeting:* Whereas, by a certain deed poll or letter of attorney under my hand and seal, bearing date the —— day of ——, I constituted and appointed [C. D.], of &c., my lawful attorney, for me and in my name *(recite power):* Now know ye, that, for various causes and considerations me thereunto moving, I, the said [*constituent*], do by these presents absolutely revoke and make void the said deed poll or letter of attorney hereinbefore recited, and every power and authority therein contained*. In witness, &c.

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* Where the letter of attorney is under seal, the revoking instrument should also be under seal. If an interval must necessarily elapse before the revocation is communicated to the attorney, (which will happen if he reside at a distance), it seems proper to add a qualification to this effect:—

Variation.

"Provided nevertheless, that nothing herein contained shall impeach or invalidate any act or acts which the said [*attorney*] shall do or cause to be done by virtue of any power or authority contained in the said recited letter of attorney, before the revocation thereof by these presents shall have been made known to the said [*attorney*]."

[*constituent*] hath hereunto set his hand and seal, this —— day of ——, ——.

TO RECEIVE MONIES PAYABLE UNDER AN ORDER IN CHANCERY IN JAMAICA.

AFFIDAVIT OF EXECUTION.

AFFIDAVIT OF EXECUTION.

ISLAND OF JAMAICA.

In Chancery.

BETWEEN

[A. B.] and [C. D.] . Plaintiffs.

and

[E. F.] . . . . . Defendant.

[A. B.], of the city of Bristol, gentleman, maketh oath, that [on the —— day of ——, in the year of our Lord ——], he this deponent, and [*other witness*], of the said city of Bristol, gentleman, were present and did see [*constituent*], of &c., sign, seal, and as his act and deed deliver, the letter of attorney [bearing date the —— day of ——, instant], hereunto annexed, and that the name [*constituent's signature*] appearing to be subscribed thereto, as the party executing the same, is of the proper handwriting of the said [*constituent*], and the names —— and —— respectively appearing to be subscribed thereto, as the attesting witnesses to the execution of the said letter of attorney, are of the respective proper handwriting of this deponent and the said [*other witness*] (*a*).

MAYOR'S CERTIFICATE.

MAYOR'S CERTIFICATE.

TO ALL TO WHOM THESE PRESENTS SHALL COME, I, [*mayor*], mayor of the city of Bristol, in pursuance of an act of Parliament, passed in the fifth year of the reign of his late Majesty, King George the Second, intituled "An Act for the more easy recovery of debts in his Majesty's

(*a*) The trouble and expense of an affidavit and mayor's certificate may be saved by executing the letter of attorney in the presence of a person who is about to proceed to the island in which the instrument is to be used, and who can make the necessary deposition there; but where the affidavit embraces other objects, which make the certificate, &c. necessary at all events, nothing is gained by this expedient.

TO RECEIVE MONIES PAYABLE UNDER AN ORDER IN CHANCERY IN JAMAICA.

plantations and colonies in America," do hereby certify, that, on the day of the date hereof, personally came and appeared before me [A. B.], of ——, of the city of Bristol, gentleman, the deponent named in the affidavit hereunto annexed, being a person well known and worthy of good credit, and by solemn oath, which the said deponent then took before me upon the Holy Evangelists of Almighty God, did solemnly and sincerely declare, testify, and depose to be true the several matters and things mentioned and contained in the said annexed affidavit.

In faith and testimony whereof, I the said mayor have caused the seal of the office of mayoralty of the said city of Bristol to be hereunto put and affixed, and the letter of attorney, mentioned and referred to in and by the said affidavit, to be hereunto also annexed. Dated at the city of Bristol, aforesaid, the —— day of ——, in the year of our Lord ——.

[*The mayoralty Seal.*]

BY TWO MERCHANTS, TO THEIR PARTNER IN BARBADOES.

LETTER *of* ATTORNEY, *by two* WEST INDIA MERCHANTS, *being in England, to their* PARTNER *in Barbadoes, to act for them in all* PARTNERSHIP TRANSACTIONS.

TO ALL PERSONS TO WHOM THESE PRESENTS SHALL COME, [*first constituent*], of &c., and [*second constituent*], of &c., *Send Greeting:* WHEREAS the said [*constituents*], together with [*attorney*], residing in Barbadoes, now carry on in partnership the business of West India merchants, and the said [*constituents*] are desirous of authorizing and empowering the said [*attorney*] to act for them in all matters relating to the said partnership in the West Indies aforesaid: NOW THEREFORE THESE PRESENTS WITNESS, that the said [*constituents*] *Do*, and each of them *Doth*, hereby nominate, constitute, and appoint the said [*attorney*] to be the attorney and agent of the said [*constituents*], in the West Indies aforesaid, in the names or name, and

Recital.

Testatum.

Appointment of attorney.

BY TWO MERCHANTS, TO THEIR PARTNER IN BARBADOES.

as the acts or act of the said [*constituents*] as such partners as aforesaid, or of the said [*constituents*] or either of them individually or otherwise, to carry on and conduct the said business according to the usual and regular course thereof (*a*), and to employ agents and servants to cultivate, manage, and improve all such plantations as may be in the possession or under the management of the said [*constituents*], or any of them, in respect of the said partnership business, and for that purpose to purchase slaves, cattle, plantation implements and utensils, and other live and dead stock; *And also* to make any consignments or dispositions of the produce of such plantation or estates, or any other plantations or estates, the produce whereof shall be at the disposal of the said partnership, and to transact all other affairs and business relating to any plantations or estates in the said Island, in which the said partners or any of them shall be interested, either as owner or owners, mortgagee or mortgagees, or otherwise; *And also* to use and pursue all such ways and means as may be necessary or proper for obtaining possession of any plantations or estates, or of the produce of any plantations or estates, to the possession whereof the said partners or any of them are or is entitled in respect of the said partnership business, either as absolute owners or by virtue of any mortgage, lien, or other security, or otherwise; *And also* to make any sales, mortgages, leases, or other dispositions that shall or may be necessary or proper, of any plantations or estates, negroes (*b*), slaves, cattle, stock, crops, produce, or other property, which the said partnership shall be entitled to or interested in; and for that purpose to sign, seal, execute, and deliver, any contracts and agreements, conveyances and assurances, and other deeds

To conduct business.

To purchase cattle, &c.

To make consignments.

To obtain possession of plantations.

To make sales, mortgages, leases, &c.

To execute contracts and conveyances.

(*a*) A power by one partner to another need not comprehend many acts, which it would be necessary to introduce in powers to persons not standing in this relation to each other, as accepting bills, &c.; since these are within the scope of the attorney's power as partner, independently of the authority derived from the instrument. This remark, indeed, applies to some of the acts particularized in this power.

(*b*) See note at the end of this precedent.

BY TWO MERCHANTS, TO THEIR PARTNER IN BARBADOES.

and instruments, according to the laws and customs of the said island of Barbadoes (*c*); *And also* to examine, adjust, and settle all accounts and reckonings, which shall be subsisting unsettled between the said partnership and any person or persons whomsoever; And to pay or receive (as the case may be) the balances (if any) which shall appear to be due on the settlement of such accounts and reckonings; *And also* to ask, demand, and receive, and, if necessary, sue for and recover, from whomsoever it may concern, all debts and sums of money, goods, property, and effects whatsoever, which are or shall be due, owing, or belonging to the said partnership, or to the said partners, or any of them, on account thereof, and on receipt or delivery thereof to give effectual receipts or discharges for the same; *And also* to compound for any debt or debts due or owing by or from the said partnership; *And also* to commence and prosecute any actions, suits, or other proceedings at law or in equity, against any person or persons in respect of any of the matters or things aforesaid, or any other matter or thing relating to the concerns of the said partnership business; And to appear to and defend any actions, suits, or other proceedings, commenced or to be commenced against the said part-

To settle accounts.

To pay or receive balances.

To receive and recover debts and other property:

And give discharges.

To compound debts.

To commence actions.

And defend actions.

Form of execution and attestation where deed is executed by attorney.

(*c*) As to the mode of execution of a deed by attorney, *vide ante*, Vol. 1, p. 19. The most correct form is thus:—

"A. B. [*the principal*], by C. D. [*the attorney*]."

The deed of course should be prepared in the ordinary way in the name of the principal. As to the form of attestation, *vide ante*, Vol. 2, p. 661.

The power of attorney should accompany the deed; but if the original cannot be obtained for the purpose, (as where the power embraces other objects), an attested copy should be annexed. The possibility of the attorney's authority having been determined by the death, or revoked by the act of the principal, previously to the execution of the conveyance, exposes purchasers to some danger in accepting conveyances executed in this manner; and, therefore, it is desirable that some collateral evidence of the existence of the principal at the time of execution should accompany the deed, for the satisfaction of future purchasers—as a letter written by him at a subsequent period.

nership, or against the said partners or any of them, by reason thereof, and either to proceed to judgment and execution, or to become nonsuit, or to suffer judgment to go by default, in any such actions, suits, or other proceedings as aforesaid, or to compromise the same, as shall seem most expedient; *And also* to submit any disputes or questions which may arise respecting any of the dealings or transactions of the said partnership business to arbitration, and for that purpose to execute any bonds or covenants of submission, and generally to act in the entire management and conduct of all the affairs and concerns of every kind and description in any manner relating to or connected with the business of the said partnership, and to use and pursue all such ways and means, and make, do, and execute all such acts, matters, and things as may be requisite or expedient for that purpose, as fully and effectually, to all intents and purposes, as the said [*constituents*], or either of them, could or might do if personally present (*d*). (*Power to appoint substitutes, &c., ut ante*, p. 149). In witness, &c.

To submit disputes to arbitration.

(*d*) As to the effect of general words in powers of attorney, *vide ante*, p. 141.

It will be observed, that one of the objects of this power is to authorize the sale of West India estates, *slaves*, &c. It has been sometimes thought that the terms of the Slave Registry Act, (59 Geo. 3, c. 120), *ante*, Vol. 2, p. 248, might be held to extend to powers of attorney authorizing the sale and conveyance of slaves; but it seems difficult to support this opinion, for such an instrument has no operation to *mortgage, sell, charge*, or in any manner *transfer* or *convey* slaves; and it is to these instruments only that the provisions of the act apply.

Stat. 59 Geo. 3, c. 120, relating to the registry of slaves.

TO RECEIVE A LEGACY.

LETTER *of* ATTORNEY *to receive a* LEGACY (*a*), *with Power to consent to an Abatement in case of a Deficiency of Assets; and, if required, to give a Bond to the Executors to refund.*

Recital of will.

TO ALL TO WHOM THESE PRESENTS SHALL COME, [*constituent*], of &c., *Sends Greeting:* WHEREAS [*testator*], late of &c., deceased, by his last will and testament in writing, bearing date the —— day of ——, gave and bequeathed to the said [*constituent*] the sum of 100*l.*, to be paid within the space of twelve months after his decease, and appointed [*executors*], of &c., executors in trust of his said will.

Testatum.

NOW THESE PRESENTS WITNESS that the said [*constituent*] *Doth* make, constitute, and appoint [*attorney*], of &c., his true and lawful attorney and agent, for him and in his name to demand and receive of and from the said [*executors*], or either of them, or any other person or persons whom it may concern, the said legacy or sum of 100*l.* so given and bequeathed to the said [*constituent*] in and by the said last will and testament of the said [*testator*], deceased, as aforesaid, together with any interest which may be due for the same: and upon payment of the same legacy and interest to give an effectual release and discharge for the same; and in case it shall be proved to the satisfaction of the said [*attorney*], that the estate of the said [*testator*], deceased, is inadequate to the payment in full of the said legacy, in a due course of administration thereof, then to accept such sum or sums of money in satisfaction and discharge of the said legacy, as the said attorney shall be of opinion (regard being had to

(*a*) A general power to receive monies authorizes the attorney to receive a legacy. *Carr* v. *Eastabrook*, 2 Cox, 390. See also *Yerbury* v. *Head*, cit. 2 Cox, 391.

TO RECEIVE A LEGACY.

the amount of the assets of the said [*testator*],) ought to be paid thereon: And also for and in the name and as the act and deed of the said [*constituent*], if the said attorney shall think proper, and he shall be required so to do, to execute any bond or obligation or covenant for the repayment or refunding of the said legacy, or of a due proportion thereof, in case the estate and effects of the said [*testator*] shall subsequently to the payment thereof prove insufficient to discharge the debts of the said [*testator*], and also the legacies bequeathed by his said will, in the same rate and proportion as the said legacy shall have been paid; and upon non-payment of the said legacy or sum of 100*l.*, or any part thereof, or of any interest due in respect thereof, for and in the name of the said [*constituent*], commence, file, and prosecute any such suit or bill in equity, or other proceedings in any court of law or equity whatsoever, for the recovering, enforcing, and obtaining payment of the same legacy, or any part thereof, as the said [*attorney*] shall think proper; And also to appear for the said [*constituent*] to any bill that may be filed, or any suit or other proceeding that shall or may be instituted touching the administration of the estate and effects of the said [*testator*], in which the said [*constituent*] shall be made defendant, and to put in an answer thereto, and generally to take and concur in such proceedings, in regard to any such suit, as the said [*attorney*] shall deem expedient; And also to submit any matter or matters connected with the claim of the said legacy, or the administration of the estate of the said [*testator*], to arbitration, and in the name of the said [*constituent*] execute and enter into any bond or bonds, covenant or covenants, to abide by and perform the award; *And generally* to do, perform, and execute all matters and things in and about the premises, as fully and effectually, to all intents and purposes whatsoever, as the said [*constituent*] might or could have done if personally present. *(Power to appoint substitute, and undertaking to ratify the acts of the attorney and substitute, ut ante,* p. 149*).*

TO RECEIVE FREIGHT.

LETTER *of* ATTORNEY *to* RECEIVE *the* FREIGHT *of a* SHIP.

KNOW ALL MEN BY THESE PRESENTS (*a*), THAT I, [*master*], of &c., master of the ship or vessel called the ——, of the burthen of —— tons, or thereabouts, *Do* hereby constitute and appoint [*attorney*], of &c., to be my true and lawful attorney, for me and in my name, and for my use and the use of the rest of the part-owners of the said ship, to demand and receive, and, if necessary, to sue for and recover by all lawful ways and means, of and from [*debtors*], of &c., merchants (*b*), and any or either of them, and all other persons whom it shall or may concern, all and every sums and sum of money which now are or is due, owing, and payable by and from them or either of them, as freight or otherwise, for or in respect of any goods or merchandizes imported in the said ship in her late voyage from —— to London, by virtue of a charter-party dated the —— day of —— last, or otherwise howsoever; and upon receipt of all or any such sums or sum of money, to give sufficient receipts and discharges for the same; I hereby confirming and agreeing to confirm whatsoever my said attorney shall lawfully do in and about the premises. IN WITNESS, &c.

(*a*) This is the most convenient form when there are no recitals; where recitals are introduced, the instrument may be commenced thus, or as in the last precedent.

East India Company, how described.

(*b*) If the demand be upon the East India Company:—

"Of and from the honourable the United Company of Merchants of England trading to the East Indies, or their treasurer."

LETTER *of* ATTORNEY *to take Possession of Estates and other Property in* GREAT BRITAIN, *the* WEST INDIES, *and the* UNITED STATES *of* NORTH AMERICA; *and to* LET *and* SELL *the same, and* RECEIVE RENTS *and* PURCHASE-MONEY, *and to* SETTLE ACCOUNTS, RECEIVE MONIES, COMPOUND DEBTS, SUBMIT DISPUTES *to* ARBITRATION; *with* POWER *to* SUBSTITUTE *other* ATTORNIES.

GENERAL POWER TO MANAGE AFFAIRS.

KNOW ALL MEN BY THESE PRESENTS, that [*constituent*], of &c., for divers good causes and considerations him thereto moving, *Hath* made, constituted, and appointed, and by these presents *Doth* make, constitute, and appoint his wife, [*wife*], and his son, [*son*], of &c., jointly, and each of them separately, the true and lawful attornies and attorney of him the said [*constituent*], for him and in his name, by all lawful ways and means, to demand and recover, and take possession of all and singular the plantations, messuages, lands, tenements, negroes, cattle, plantation implements and utensils, and all other the property, estate, and effects whatsoever, real as well as personal, now of or belonging, or which shall hereafter belong to him the said [*constituent*], in Great Britain, the West Indies, or the United States of North America (*a*);

Appointment of attornies.

To demand and take possession of estates, &c.

(*a*) Where a power is intended to be used in the United States, the person executing it should attend at the office of the Consulate, (which, in London, is near Bishopsgate Church), where the execution will be duly authenticated; but if this be impracticable, the party should execute the power in the presence of a notary public and two other persons, and the notary will attest it by an act in the usual way. The papers should then be taken to the Consulate's office of the States, (at the nearest port), where the necessary authentication of the notary's act may be obtained. If the

Powers of attorney for the United States, how to be authenticated.

GENERAL POWER TO MANAGE AFFAIRS.

And upon obtaining possession thereof, to execute and give all proper releases and discharges for the same or in respect thereof, and thereupon to set, let, sell, dispose of, manage, or employ the same, or any part or parts thereof respectively, in such manner as they the said [*attornies*], or either of them, shall think proper and expedient; And for him the said [*constituent*], and in his name, and as his act and deed, to sign, seal, deliver, and execute all such leases or agreements for leases, contracts or agreements for sale, conveyances, and assurances, with all usual and reasonable covenants therein, on the part of the said [*constituent*], of all or any part or parts of the said plantations, messuages, lands, tenements, negroes, cattle, plantation implements and utensils, and other property, estate, and effects, as shall be found necessary or expedient; And to receive and take the purchase monies or other considerations for such part thereof as shall be sold, and the rents and profits to accrue and become due for such parts thereof as shall be set or let, to and for the use of him the said [*constituent*], and in his name to sign and give proper and sufficient receipts for the same respectively; *And also*, for him the said [*constituent*], and in his name, and on his part and behalf, to call for, examine, settle, adjust, and sign all accounts now depending, and which may hereafter depend between him the said [*constituent*] and any other

And give discharges.

Also to execute leases and conveyances.

And receive purchase-monies, rents, &c.

To adjust accounts.

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power is to be used in the United States only, (and not, as in this case, in the West Indies also), no stamp will be requisite.

The notarial act may be in the common form, as follows:—

Form of notarial act.

I, [A. B.], of &c., notary public, by royal authority duly admitted and sworn, do hereby certify and attest unto all whom it may concern, that the letter of attorney hereunto annexed was duly signed and sealed by [*constituent*], of &c., therein named, in my presence and in the presence of [*two attesting witnesses*]. To the due execution whereof an act being requested, I have granted the same under my notarial form and seal of office, to serve and avail as occasion may require. Done and passed at —— aforesaid, this —— day of ——.

[*Notarial Seal*].

person or persons whomsoever, in Great Britain, the West Indies, or the United States; And for him the said [*constituent*], and in his name, and for his proper use and benefit, by all lawful ways and means to ask, demand, recover, and receive of and from all and every the persons and person liable to pay the same, all and every sums and sum of money whatsoever, now due and owing, and which may hereafter accrue and become due to him the said [*constituent*], by specialty or simple contract, for arrears of rent, or upon any other account whatsoever; And upon receipt of any such sums or sum of money, to give and execute sufficient releases and discharges for the same; *And also* to commence and prosecute any actions, suits, or other proceedings at law or in equity, against any person or persons in respect of any of the matters or things aforesaid, and to appear to or defend any actions, suits, or other proceedings to be commenced or prosecuted against the said [*constituent*], and to proceed to judgment and execution, or become nonsuit, or suffer judgment to go by default, in any such actions, suits, or other proceedings, or to compromise the same, as to the said [*attornies*], or either of them, shall seem most expedient; And the said [*constituent*] doth hereby further authorize and empower them the said [*attornies*] jointly, and each of them separately, to compound for any debt or debts now due or hereafter to become due to him the said [*constituent*], and to accept part thereof in discharge of the whole, if they or either of them shall see occasion so to do; and to submit any dispute or disputes now depending, or which may hereafter arise, touching any debt or debts due to the said [*constituent*], or in anywise touching his estates, property, or effects, to arbitration, and execute any bond or covenant to abide by and perform the award which shall be made thereon; *And also* to do, perform, and execute all such other acts, matters, and things whatsoever, as shall or may be requisite or necessary in or about the premises; and generally to act in the management, arrangement, and superintendance of all other the concerns, affairs, and business whatsoever of him the said [*constituent*], in Great Britain, the West Indies, and the United States, in such

GENERAL POWER TO MANAGE AFFAIRS.

And to receive monies.

And give receipts.

To bring or defend actions.

To compound debts.

And submit disputes to arbitration.

GXNERAL POWER TO MANAGE AFFAIRS.

manner as they the said [*attornies*], or either of them, shall think most for his benefit and advantage, and as fully and effectually in all respects as he himself could have done if personally present (*b*); *And also* to substitute or appoint any person or persons to act under or in the place of the said attornies or attorney in all or any of the matters aforesaid, and every such substitution at pleasure to revoke, the said [*constituent*] hereby agreeing to ratify and confirm whatsoever the said [*attornies*], or either of them, or their, his, or her substitute or substitutes shall lawfully do or cause to be done in or about the premises, by virtue of these presents. IN WITNESS, &c.

To appoint a substitute.

(*b*) That no reliance is to be placed on these general words, *vide ante*, p. 141. The principal aim in preparing powers of this kind should be, to make them as explicit and particular as possible.

TO LEASE, CHARGE, AND SELL ESTATES, AND PAY DEBTS, RAISE MONEY BY WAY OF ANNUITY, &c.

LETTER *of* ATTORNEY *from a* MERCHANT, *having large Estates in England, previously to his going abroad, containing very* EXTENSIVE *and special* POWERS *to* DEMISE *and* MANAGE ESTATES, APPOINT BAILIFFS, EXERCISE POWERS OF ENTRY, &c. IN LEASES, PROCEED AGAINST TENANTS, &c. COLLECT RENTS, SETTLE DEBTS, BRING ACTIONS, REFER *to* ARBITRATION, SELL, MORTGAGE, *or* CHARGE *the* ESTATES *in Great Britain, and in Saint Vincent, and* GRANT ANNUITIES, *and* OTHERWISE *to* ACT *in his* CONCERNS. *(Addition where another Attorney is appointed, in the event of the Decease of the first).*

TO ALL TO WHOM THESE PRESENTS SHALL COME, I, [*constituent*], late of the island of Saint Vincent, but now of —— in the county of ——, in England, esquire, *Send Greet-*

ing: WHEREAS I the said [*constituent*] have been heretofore engaged in commercial concerns in England, which are not yet wholly wound up, and sundry debts yet remain due and owing by me in respect thereof, and I am seised and possessed of or entitled to certain freehold and leasehold farms, lands, and hereditaments, and other personal estate and effects in England, and several persons residing in England are indebted to me in various sums of money, and I am also seised and possessed of or entitled to certain plantations and estates in the island of Saint Vincent aforesaid, with several negroes, slaves, and other stock upon or belonging to the said plantations or estates; AND WHEREAS I am now about to leave England and to reside in the said island of Saint Vincent, in order to manage my estates and concerns there, and to provide for the payment of the debts which I have so contracted in England as aforesaid, and I am desirous of appointing a proper person as my attorney, with such powers and authorities as may be necessary or convenient for enabling him, during my absence from England, to manage and conduct my property and affairs as effectually as if I were personally present; THEREFORE, for effectuating the purpose aforesaid, KNOW YE, that I the said [*constituent*] *Have* made, ordained, constituted, and appointed, and by these presents *Do* make, &c., [*attorney*], of &c., esquire, my true and lawful attorney and agent, for me, and in my name or otherwise, and on my behalf, to take possession of, let and set, or, if he shall think proper to keep in his own hands, manage and improve my freehold and leasehold messuages, farms, lands, and hereditaments, in ——— and elsewhere in Great Britain, and from time to time to appoint any bailiff, stewards, or agents, to assist him in managing the same, with such salaries or allowances as he shall think reasonable; and from time to time to displace or remove the persons so appointed, or any person or persons now acting in any such capacity or capacities; and also for the more effectually carrying into effect the purposes aforesaid, for my said attorney in my name, and as my act and deed, to make, sign, seal, deliver, and execute, any agreement or agreements, contract or contracts, lease or leases, or other lawful deeds or instruments whatsoever, for granting, demis-

TO LEASE, CHARGE, AND SELL ESTATES, AND PAY DEBTS, RAISE MONEY BY WAY OF ANNUITY, &c.

Recitals.

Appointment of attorney.

To let estates and grant leases.

TO LEASE, CHARGE, AND SELL ESTATES, AND PAY DEBTS, RAISE MONEY BY WAY OF ANNUITY, &c.

ing, or letting all or any of the said freehold and leasehold messuages, farms, lands, and hereditaments, in consideration of any fine or fines or without fine, and under and subject to such conditions, rents, covenants, and agreements, as my said attorney shall think fit; *And also* by virtue of any powers reserved to me in and by any leases under which the said premises may from time to time be held, or otherwise, to enter into and upon the said premises or any part thereof, to view and examine the state and condition thereof, and give the proper notices and directions respecting the repairs and cultivation of the same; or, if my said attorney shall deem expedient, by entry or otherwise wholly to determine and make void any such lease or leases by virtue of any power or powers therein contained, and generally to exercise all or any other powers, rights, and privileges, reserved to me in and by any such leases; *And also* from time to time, for me and in my name or otherwise, to demand and receive of and from the tenant and tenants of my said freehold and leasehold estates, and of and from my stewards, bailiffs, and agents, and all and every other person or persons whomsoever liable to pay or account for the same, all and every or any of the rents, issues, and profits, which now are or is, or hereafter shall or may be due and owing, accruing, reserved, or arising for or in respect of all and every or any of my said freehold and leasehold estates in Great Britain, (making such allowances and deductions thereout as may lawfully or reasonably be claimed); AND ALSO all and every or any such other sum or sums of money, legacies, debts, duties, goods, chattels, effects, and things whatsoever (*a*), as are, or is, or shall or may be due and owing or payable, coming or belonging to me, or which he the said [*attorney*] shall think, or be advised, I am or shall be entitled to; and upon receipt or delivery of the said rents, arrears of rent, issues and profits, sums of money, debts, duties, legacies, goods, chattels, effects, and things, or any of them, or any part or parts

To enter by virtue of powers in leases.

To determine leases.

To receive rents;

And all other debts and effects.

To give discharges.

(*a*) This power will not enable the attorney to receive dividends on stock in the public funds, for which a power must be obtained at the Bank of England.

thereof respectively, to make, give, sign, seal, and execute all and every such good and sufficient acquittances, releases, and discharges in the law whatsoever for the same, as my said attorney shall think fit and expedient (*b*); *And* in case of non-payment of all or any part or parts of the said rents, arrears of rent, issues, and profits, or the non-payment or non-delivery of all or any of the said sums of money, debts, duties, legacies, goods, chattels, effects, and things, or any part or parts thereof respectively, for me and in my name, or otherwise, to enter and distrain for all or any part of the said rents or arrears of rent, [and the distress and distresses then and there found to take, lead, drive, carry away, impound and in pound to detain and keep, or to sell and dispose of the same, or otherwise to act therein according to the law]; and to commence or institute any action or actions, suit or suits, in any Court or Courts of law or equity, or other proceeding or proceedings which my said attorney shall deem requisite or proper, to compel the payment or delivery of all or any of the said rents, arrears of rent, issues and profits, sums of money, legacies, debts, duties, goods, chattels, effects, and things, or any part or parts thereof respectively, or to enforce the performance of any covenant or covenants contained in any indenture of lease, granted or to be granted, of my said estates, or any part thereof, or to recover the possession of the said estates or any part thereof; and the same action or actions, suit or suits respectively, to prosecute and follow up, or to discontinue and become nonsuit or otherwise to act therein as my said attorney shall deem expedient; and to use all or any other lawful ways and means whatsoever for obtaining the payment or delivery of all such rents, arrears of rent, issues, and profits, sums of money, debts, duties, legacies, goods, chattels, effects, and things as aforesaid, or enforcing the performance of the said co-

TO LEASE, CHARGE, AND SELL ESTATES, AND PAY DEBTS, RAISE MONEY BY WAY OF ANNUITY, &c.

In case of non-payment of rent to distrain.

And commence actions for rents or other monies.

(*b*) This instrument might be greatly abbreviated; but in this and some other instances, the editor has given the precedent entire, leaving it to the reader to reject as much of the redundant matter as he thinks proper, this task being much less troublesome to a person using the precedent than that of making additions to it.

TO LEASE, CHARGE, AND SELL ESTATES, AND PAY DEBTS, RAISE MONEY BY WAY OF ANNUITY, &c.

venants, or recovering the possession of the said estates as aforesaid; *And also* to state and finally settle and adjust all accounts, reckonings, and demands whatsoever, between me and any person or persons whomsoever, and to receive the balance or balances thereof, if any; And upon settling or adjusting such accounts respectively, and payment of such balances, acquittances, releases, and other discharges, from time to time, to make, execute, and give for the same respectively; And in case of refusal or non-payment of all or any part or parts of any balance or balances that shall happen to be due to me, to compel the payment thereof by all or any of the ways or means aforesaid; And also, in case any person or persons who is, or are, or shall be indebted to me, shall become a bankrupt or bankrupts, to prove such debt or debts under the commission or commissions issued against him, her, or them, and receive the dividend or dividends payable in respect thereof; and, if my said attorney shall think proper, for me and in my name, or otherwise, to sign the certificate or certificates of any such bankrupt or bankrupts: And also to compound, compromise, and submit to arbitration, conclude, and adjust any debt or debts, sum or sums, due or owing to or from or by me, or any other claim, demand, dispute, difference or controversy, subsisting or depending or to arise between me and any other person or persons whomsoever; And for that purpose, for me and in my name, or otherwise, and on my behalf, to enter into and execute one or more bond or bonds of arbitration; And to stand to, obey, abide, and perform the award, order, or arbitration of such arbitrator or arbitrators as shall be appointed; *And also* from time to time to appear for me the said [*constituent*], in any Court of law or equity or other Court whatsoever, to any action, bill, suit, information, or complaint, that is or shall be brought, commenced, or prosecuted against me, or whereunto I shall be a party, and to defend the same, or suffer judgment or judgments, decree or decrees, to be had, given, taken, or pronounced against me in any such action, bill, suit, information, or complaint, by default or otherwise, as my said attorney shall be advised or think proper; *And also*, for me and in my name, or otherwise, and on my behalf, to en-

To settle accounts;

And recover balances.

To compound debts and refer to arbitration.

To execute bonds of arbitration.

To appear to and defend actions.

To make arrangements with creditors.

ter into any agreement with any person or persons to whom I am, or shall, or may be indebted, touching or concerning the payment or liquidation of his, her, or their debt or respective debts, or any part thereof respectively; And to execute and give to any such person or persons, any security or securities, real or personal, on any part of my estate and effects, either in Great Britain or the said island of Saint Vincent, for the payment of his, her, or their debt, or respective debts, or any part or parts thereof respectively, either with or without interest, by instalments or otherwise, at such time or respective times, and under and subject to such terms, conditions, stipulations, and agreements of any nature soever, as my said attorney shall think reasonable or proper; *And also,* for me and on my behalf, to borrow and take up at interest upon any security, real or personal, any sum or sums of money my said attorney shall think proper; And for the purpose of securing any debt or debts, or sum or sums of money now due or owing, or hereafter to become due or owing from me to any person or persons, either with or without interest for the same as aforesaid, or any such sum or sums of money so to be borrowed or taken up at interest as aforesaid, or for any other purpose which my said attorney shall think expedient or proper, for me and in my name to sign, make, indorse, or accept any promissory note or notes, or bill or bills of exchange, and enter into, sign, seal, execute, and deliver any covenant or covenants, agreement or agreements, bond or bonds, or warrant of attorney or warrants of attorney for confessing judgment against me in any Court or Courts either in Great Britain or Saint Vincent aforesaid; And to mortgage, charge, or otherwise incumber, all or any part or parts of my freehold and leasehold plantations, lands, and tenements, negroes, stock, chattels, and real and personal estate and effects whatsoever, either in Great Britain or in the said island of Saint Vincent; And also in case my said attorney shall think proper or expedient, for me and on my behalf, to sell and absolutely dispose of all or any part or parts of my freehold and leasehold estates, goods, chattels, and effects in Great Britain or Saint Vincent aforesaid, (whether the same shall have been

TO LEASE, CHARGE, AND SELL ESTATES, AND PAY DEBTS, RAISE MONEY BY WAY OF ANNUITY, &c.

And give security for debts.

To borrow monies.

To give bills, bonds, and warrants of attorney, &c. for monies due.

And to mortgage or sell real and personal estate.

TO LEASE, CHARGE, AND SELL ESTATES, AND PAY DEBTS, RAISE MONEY, BY WAY OF ANNUITY, &c.

previously mortgaged or not), together or in parcels, and either by public auction or private contract, to any person or persons willing to purchase the same, for such price or prices, or sum or sums of money, as to my said attorney shall seem reasonable, and to release, convey, assign, transfer, and make over the same premises respectively to the purchaser or purchasers thereof respectively; And for all or any of the purposes hereinbefore mentioned, for me and in my name, and as my act and deed, to sign, seal, execute, and deliver, and (when necessary) acknowledge all and every such deeds or deed, to be enrolled or not enrolled, mortgage or mortgages, conveyances, transfers or assignments, or other assurances whatsoever, of my said estates in Great Britain and Saint Vincent or elsewhere, or any of them, or any part or parts thereof respectively, as my said attorney shall think proper, with such covenants, conditions, provisoes, and agreements, as he shall think meet, for effectually conveying to and vesting in any person or persons, his, her, or their heirs, successors, executors, administrators, or assigns, respectively, the same estates respectively, or such of them, or such part or parts thereof respectively, with their rights, members, and appurtenances, as shall be sold or mortgaged, or agreed so to be, under the powers hereinbefore contained, or any of them, or for charging or securing the payment of any sum or sums of money, with or without interest thereon, at such time or times, and in such manner, as my said attorney shall see occasion, or for any other purpose authorized by these presents; And for me and in my name, to sign and give receipts for all and every or any sums or sum of money which shall arise from any such sale or sales as aforesaid, or which shall be so borrowed or taken up at interest as aforesaid, by virtue of the powers hereinbefore contained, which receipts shall be sufficient discharges to the persons paying the same, and shall exempt them from all responsibility in respect of the application thereof; *And* by, and with, or out of such monies as shall from time to time come to the hands or power of my said attorney, under or by virtue of any of the powers or authorities aforesaid, to pay and discharge, in the first place, all the expenses of preparing, engrossing, and executing these

To execute mortgages and conveyances.

To give receipts for purchase-monies and monies borrowed.

Out of monies received, in the first place to pay expenses;

presents, and all other costs, charges, damages, and expenses which my said attorney shall pay, sustain, incur, or become liable to, in or about the execution of the powers vested in or given to him by these presents, or in anywise relating thereunto; *And*, in the next place, to pay and discharge any debt or debts which is, or are, or shall, or may be due and owing from me, or such of them or such part thereof as my said attorney shall think proper; or to apply the same, or such part thereof as he in his discretion shall think necessary, in or for the keeping down and discharging the interest due or to grow due on any securities given or hereafter to be given by me or by my said attorney by virtue hereof (*c*); And also, for such other purposes, and in such other manner, as I shall from time to time, by any letter or letters, writing or writings, under my hand, direct, order, or appoint, or otherwise to dispose of the same for my use and benefit as he shall think fit; And whereas I am indebted to [*creditor*], of the city of London, merchant, in the sum of £——, or thereabouts, for which he has accepted my bond, payable by instalments, and taken certain other securities for the payment of the same; And whereas it might materially facilitate the arrangement of my affairs, provided a sum of money could be raised by way of annuity for the payment of the said debt of the said [*creditor*], or any part or parts thereof; Now I do hereby authorize and empower my said attorney to raise, by way of annuity on one or more life or lives, any sum of money not exceeding the amount of the said sum of £——, for the purpose of paying off and sa-

TO LEASE, CHARGE, AND SELL ESTATES, AND PAY DEBTS, RAISE MONEY BY WAY OF ANNUITY, &c.

And then to pay debts.

To keep down interest.

Recital that constituent is indebted to A.

Power to raise money by way of annuity to pay debt due to A.

(*c*) "Or in discharging the growing payments of any annuity or annuities heretofore granted by me, or hereafter to be granted by me or my said attorney, or in providing a sufficient fund or funds for the redemption or the repurchase of the same annuity or annuities, or for the liquidation of any other charges or incumbrances from time to time affecting my estate and effects or any part thereof, and for that purpose to invest any monies in the public funds, or on other government or real security at interest, in the name of my said attorney."

Or in discharging the growing payments of annuities.

TO LEASE, CHARGE, AND SELL ESTATES, AND PAY DEBTS, RAISE MONEY BY WAY OF ANNUITY, &c.

tisfying the said debt of the said [*creditor*], or such part thereof as may be thought expedient by my said attorney, And thereupon, for me, and in my name, and on my behalf, to execute any bond or bonds, warrant or warrants of attorney to confess judgment, and any grant or conveyance of all or any part or parts of my estate or effects, real or personal, with such clauses, agreements, conditions, and covenants, to be therein contained, as the grantee or grantees of the said annuity or annuities, or his, her, or their counsel learned in the law shall require, for securing the payment of the said annuity or annuities; PROVIDED ALWAYS, that no such annuity or annuities shall be granted, except on the terms of being redeemable at the end of three years at the latest, to be computed from the time of granting the same, or for a less consideration than seven years' purchase if on one life, or eight years' purchase if on two lives, or ten years' purchase if on three lives; And I do hereby expressly declare, that the receipts of my said attorney, for all or any part of the monies which shall form the consideration of the said annuities, or any of them, shall be good and complete discharges, both at law and in equity, to the annuitant or annuitants who shall pay the same, And that he, she, or they shall in no respect be responsible for the application thereof; *And generally*, for me, and in my name, and on my behalf, to do, perform, and execute, all and every other acts and act, deeds and deed, matters and things whatsoever, which my said attorney shall think necessary or proper to be done in or about or concerning my estates, property, debts, concerns, or engagements, during my absence from England, as fully and effectually, to all intents and purposes, as I might or could do, if I were personally present, and did the same in my own proper person, it being my intention and meaning that all matters and things respecting the same shall, during my absence from England, be under the full and sole management, discretion, and control of the said [*attorney*]. AND for the more effectually executing the several matters aforesaid, I the said [*constituent*] do hereby give to my said attorney full power, from time to time, to appoint one or more attorney or attornies, substitute or substitutes, under or for him, and as my or his attorney or attornies,

Proviso that annuity shall be redeemable on certain terms.

Receipts of attorney to be good discharges.

Attorney to perform all other necessary acts respecting property and concerns of constituent.

Power to appoint substitutes.

to do, perform, and execute all or any of the powers and authorities hereby vested in or given to him the said [*attorney*] as aforesaid; And from time to time the same attorney or attornies at pleasure to remove, and the powers or authorities given to him or them to revoke, and another or others in his or their place to appoint, and with the same or any other powers or authorities to invest; *And generally*, to do, perform, and execute all and every acts and act, deeds and deed, things and thing, which shall be necessary or expedient to be done in or about the premises, as fully and effectually to all intents and purposes as I might or could do if I were personally present; I hereby ratifying and confirming, and agreeing to ratify and confirm all and whatsoever my said attorney or his substitute or substitutes shall lawfully do or cause to be done in or about the same by virtue hereof (*d*). IN WITNESS, &c.

TO LEASE, CHARGE, AND SELL ESTATES, AND PAY DEBTS, RAISE MONEY BY WAY OF ANNUITY, &c.

And generally to perform all necessary acts in the premises.

(*d*) See a shorter form of power to appoint substitutes, and agreement to ratify, *ante*, p. 162.

Sometimes it is convenient to provide for the event of the attorney (there being only one) dying during the absence of the principal, especially if that absence is likely to be of long duration. The addition to the power may be as follows—

"AND WHEREAS the said [*attorney*] may happen to depart this life during my absence from England, in consideration whereof, and to prevent the inconvenience and detriment which might result therefrom to my affairs, I have determined to appoint [*second attorney*], of &c., to be my attorney in the place and stead of the said [*first attorney*] in such event; NOW THEREFORE FURTHER KNOW YE, that I the said [*constituent*] *Have* made, ordained, constituted, and appointed, and by these presents *Do* make, ordain, constitute, and appoint the said [*second attorney*] to be my true and lawful attorney and agent, from and immediately after the decease of the said [*first attorney*], in case he shall happen to depart this life during my absence from England, for me and in my name, and on my behalf, to do, perform, and execute all and every the several acts, deeds,

Appointment of another attorney in case of the death of the first.

TO LEASE, CHARGE, AND SELL ESTATES, AND PAY DEBTS, RAISE MONEY BY WAY OF ANNUITY, &c.

matters, and things hereinbefore mentioned, as fully and effectually, and in like manner in all respects as he the said [*first attorney*] could or might have done in his lifetime; And for this purpose I do hereby accordingly give and grant to and vest in him the said [*second attorney*], all and every such and the same or the like powers and authorities, in or concerning the premises, in all things, as are hereinbefore given and granted to or vested in the said [*first attorney*], and as if the name of the said [*second attorney*] had been inserted in these presents, instead of the name of the said [*first attorney*], I hereby ratifying and confirming, and agreeing to ratify and confirm all and whatsoever the said [*second attorney*], or any substitute or substitutes to be appointed by him, shall lawfully do or cause to be done in or about the premises by virtue hereof*."

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* If the power is transmitted to a person at a distance, who may possibly refuse or be unable to act, it may be prudent to make provision for such event; the present clause might easily be adapted to such a case.

LETTER *of* ATTORNEY *by* DEVISEES *and* EXECUTORS *in* ENGLAND, *authorizing certain Persons in Granada to* TAKE POSSESSION *of and* RECEIVE *the* PROPERTY *and* DEBTS *of the Testator there.*

BY EXECUTORS TO TAKE POSSESSION OF PROPERTY, &c.

KNOW ALL MEN BY THESE PRESENTS, that [*constituents*], devisees and executors named in the last will and testament of [*testator*], of &c., deceased, [*Have*, and each of them *Hath* nominated, constituted, and appointed, and] by these presents *Do*, and each of them *Doth*, nominate, &c. [*attornies*], of &c., and each of them, jointly and severally, their and each of their true and lawful attornies and attorney, for them and each of them, and in their and each of their names or name, as such devisees and executors as aforesaid, or in the names or name of the said attornies, or either of them, or otherwise as the case shall require, to demand, take, and receive full possession and seisin of all and every the plantations, lands, hereditaments, and real and personal estate whatsoever, in the said island of Grenada (*a*), now vested in or belonging to said [*constituents*], as the real and personal representatives of the said [*testator*], deceased, or whereof or wherein they or either of them have any estate, right, title, or interest, as such devisees and executors as aforesaid, or otherwise howsoever, And also of all negro and other slaves, live and dead stock, utensils and implements to the said plantations, lands, and hereditaments, or any of them belonging or appertaining, and to take upon themselves

Constituents, as devisees and executors,

Appoint attornies jointly and severally.

To take possession of testator's real and personal estate in the island of Grenada.

(*a*) As the power comprehends the receipt of personal estate and debts which have no fixed locality, it is better in general to extend it to all the West India Islands, as some of the islands are much connected, and the debtors may have removed their residence to another island. In this case add—

"or elsewhere in the West Indies."

BY EXECUTORS TO TAKE POSSESSION OF PROPERTY, &c.

or himself the whole management or direction thereof; and to receive and take the rents, issues, and profits thereof, and of every part thereof, and to pay and defray all necessary charges and expenses in and about the aforesaid several plantations and premises, and the supplying and keeping up the stock thereof respectively, and to remit and consign to them the said [*constituents*] the produce and profits thereof, or otherwise to dispose thereof in such manner as they shall from time to time direct;

And to receive the rents and pay all charges.

Also to receive and recover debts owing to the testator.

And also, for them the said [*constituents*], as such devisees and executors as aforesaid, or otherwise, to ask, demand, sue for, recover and receive of and from all and every persons and person in or belonging to the said island of Grenada (*b*), whom it doth or shall or may concern, all arrears of rent, and sums of money, debts, dues, duties, goods, merchandises, and effects whatsoever, now due, owing, and payable, or belonging, or which shall or may at any time or times hereafter become due, owing, payable, or belonging to them the said [*constituents*], or either of them, as such devisees and executors as aforesaid, or otherwise howsoever; And upon receipt thereof, or any part thereof, for them or either of them, and in their or either of their names or name, or in the names or name of the said attornies or either of them, or otherwise as the case shall require, to sign, seal, execute, deliver, and give all and every such releases, acquittances, or other good and sufficient discharges, as shall be thought requisite in that behalf;

And to give discharges.

To adjust accounts.

And also to examine, settle, adjust, and balance all accounts which now are, or shall or may at any time hereafter be open or depending between the said [*constituents*], as such devisees and executors as aforesaid, or either of them, and any other person or persons in or belonging to the said island of Grenada (*b*), and to receive and pay (as the case may require) the balances thereupon found due; *And also* to compromise or refer to arbitration, or otherwise compound all or any matters in difference between the said [*constituents*], as such devisees and executors as aforesaid, and all and every other person and persons whomsoever, in or belonging to the said island (*b*), and to perform and

To compromise and refer to arbitration.

(*b*) "or elsewhere in the West Indies."

fulfil such award or awards, agreement or agreements, as shall be thereupon made; *And generally* to do, perform, and execute, all and every such further and other acts, deeds, matters, and things whatsoever, as shall be requisite and necessary in, about, or concerning the premises, or any part thereof, in as full, ample, and beneficial a manner, to all intents and purposes whatsoever, as the said [*constituents*], or either of them, might or could do, in their or his own proper persons or person. *(Add power to appoint substitutes, and agreement to ratify, ut ante*, p. 149). In witness, &c.

BY EXECUTORS TO TAKE POSSESSION OF PROPERTY, &c.
General words.

LETTER *of* Attorney *to* execute *an* Indenture.

TO EXECUTE AN INDENTURE.

KNOW ALL MEN by these presents, that I, [*constituent*], of &c., for divers good causes and considerations me thereunto moving, *Have* constituted and appointed, and by these presents *Do* constitute and appoint [*attorney*], of &c., my true and lawful attorney, for me and in my name, and as my act and deed, to sign, seal, and deliver a certain indenture or intended indenture, bearing date or intended to bear date on or about the —— day of —— last, made or expressed to be made between me, by my name and description of ——, *(insert description)*, of the one part; and [A. B.], of &c., of the other part; whereby certain covenants are or are intended to be made by me with the said [A. B.], *(or otherwise as the case may be; add power, &c. as in the last precedent)*. In witness, &c.

APPOINTMENT OF SUBSTITUTES UNDER A LETTER OF ATTORNEY.

LETTER *of* ATTORNEY *appointing two Persons jointly and severally as* SUBSTITUTES, *by virtue of an* AUTHORITY *in a Letter of Attorney.*

TO ALL TO WHOM THESE PRESENTS SHALL COME, [*constituent*], of the city of London, *Sends Greeting:*

Recital of letter of attorney with power to appoint substitutes.

WHEREAS —— of the city of ——, merchant, (then in London), did duly make and execute under his hand and seal a certain deed poll or letter of attorney, bearing date the —— day of ——, whereby the said [*former constituent*] did constitute and appoint the said [*present constituent*] his true and lawful attorney, for him and in his name, *(recite power, including the authority to appoint a substitute).*

Testatum.

NOW THESE PRESENTS WITNESS, that the said [*present constituent*], by virtue and in execution of the power and authority in that behalf contained in the said recited letter of attorney, and of all other powers and authorities him thereunto enabling, [*Hath* made, constituted, and appointed, and] by these presents *Doth* make, constitute, and appoint [*two attornies*], of &c., merchants, and each of them, to be the true and lawful attornies and attorney, jointly and separately, of the said [*former constituent*], for him and in his name, place, and stead, or in the name, place, and stead of the said [*present constituent*], to execute and perform all and every the powers and authorities, matters, and things mentioned and contained in the said in part recited deed poll or letter of attorney, in such and the same manner, and as fully and effectually, to all intents and purposes, as he the said [*former constituent*], or as the said [*present constituent*], might or could have done if personally present, and as they the said [*attornies*], or either of them, might or could have done if they had been named and appointed the attornies jointly and severally of the said [*former constituent*] in and by the said deed poll or letter of attorney, in the

Appointment of substitutes.

stead of the said [*present constituent*], the said [*present constituent*] hereby confirming and agreeing to confirm whatsoever the said [*attornies*] jointly, or either of them separately, shall lawfully do or cause to be done in and about the premises. IN WITNESS, &c.

APPOINTMENT OF SUBSTITUTES UNDER A LETTER OF ATTORNEY.

LETTER *of* ATTORNEY *executed by* TRUSTEES FOR SALE *of an Estate in Jamaica, to certain Merchants resident there, to* ENTER UPON *and* DISPOSE OF *the Trust Property pursuant to the* TRUSTS *of the Deed, which contained an express Authority to appoint Attornies for the Purpose.*

BY TRUSTEES FOR SALE, UNDER AN EXPRESS AUTHORITY TO APPOINT ATTORNIES.

TO ALL TO WHOM THESE PRESENTS SHALL COME, [A. B.], of the city of Bristol, merchant, and [C. D.] and [E. F.], both of the city of London, merchants, *Send Greeting:* WHEREAS, by indentures of lease and release, bearing date respectively on or about the —— and —— days of —— last past, the release being of three parts, and made between ——, of the first part; ——, of the second part; and the said [*constituents*], of the third part; all that plantation and sugar-work, called by the names of ——, and the lands thereunto belonging, situate in the parish of Hanover in the island of Jamaica, and all mills, mill-houses, boiling-houses, curing-houses, still-houses, and all other houses, outhouses, edifices, and buildings, on the said plantation and lands or any part thereof erected: And also all and every the negroes and other slaves then upon or belonging to the said plantation, together with the issue and increase of the females of the said slaves: And also all and every the horses, mares, mules, steers, neat cattle, and other live stock, coppers, stills, worms, worm-tubs, ladles, skimmers, drips, pots, pans, wains, waggons, plantation-utensils, and implements for planting, upon and belonging to the said plantation

Recital of deeds of conveyance in trust for sale.

BY TRUSTEES FOR SALE, UNDER AN EXPRESS AUTHORITY TO APPOINT ATTORNIES.

and sugar-work, with their and every of their issue and appurtenances, were conveyed and assured unto and to the use of the said [*constituents*], their heirs and assigns; UPON TRUST that they the said [*constituents*], or the survivors or survivor of them, or the heirs of such survivor, should concur with all proper parties in making sale and disposal of the said hereditaments and premises thereinbefore recited, either together or in parcels, and by public sale, auction, or vendue, or by private contract, to any person or persons, at and for such price or prices as could be reasonably obtained for the same; and should, upon payment of the purchase-money or purchase-monies, concur with all proper parties in assuring the said hereditaments and premises, or such part or parts thereof as should be so sold, and the fee-simple thereof respectively, to such purchaser or purchasers, his, her, or their heirs and assigns; and should, in the meantime, and until such sale or sales should be made as aforesaid, receive and take all the rents, profits, and produce of the said premises, and should pay, apply, and dispose of the money arising from such sale or sales, and from the said rents, profits, and produce, as in the said indenture mentioned; and it was thereby declared, that the receipt or receipts of the said [*constituents*], or the survivors or survivor of them, or the heirs or assigns of such survivor, or their or his lawful attornies or attorney, signed with their or his hands or hand, should be a sufficient discharge and sufficient discharges to the purchaser or purchasers of the said hereditaments, who should not be liable to see to the application of the purchase-money, which in and by such receipt or receipts should be acknowledged to be received. AND in order to facilitate such sale or sales as aforesaid, it was by the said indenture of release expressly declared and agreed, that it should be lawful for the said [*constituents*], and the survivors and survivor of them, and the heirs of such survivor, from time to time as occasion should require, to nominate and appoint by writing under their or his respective hands and seals, or hand and seal, one or more attorney or attornies in Jamaica, for the purpose of joining in such sales as are thereby authorized and directed, and for carrying into execution the said trusts thereby created. NOW THESE PRESENTS WITNESS, that the said [*constituents*], as such

Receipts by trustees, or their attornies, to discharge purchasers.

Power to nominate attornies, to carry into execution the trusts of the deed.

Testatum.

BY TRUSTEES FOR SALE, UNDER AN EXPRESS AUTHORITY TO APPOINT ATTORNIES.

trustees as aforesaid, *Do*, and each of them *Doth*, by these presents, make, constitute, and appoint, and in their place put [*three attornies*], of &c., any or either of them (*a*), jointly and severally to be the true and lawful attornies and attorney of them the said [*constituents*], as such trustees as aforesaid, and of the survivors and survivor of them, for and in the name or names of them the said [*constituents*], as such trustees as aforesaid, or the survivors or survivor of them, to enter upon, and by all lawful and reasonable ways and means take possession of, the said plantation and sugar-work, lands, tenements, slaves, hereditaments, cattle, stock, plantation-utensils and implements of planting, situate in the said island of Jamaica, conveyed by the said recited indentures of lease and release; and the same to order, manage, and cultivate, and to receive and take the rents, profits, and produce thereof, and the same to ship and remit to Great Britain, or otherwise dispose of, as they the said [*constituents*], or the survivors or survivor of them, shall from time to time direct; *Also*, for and in the names or name of them the said [*constituents*], as such trustees as aforesaid, or the survivors or survivor of them, to ask, demand, recover, enforce, and receive of and from all and every person and per-

Appointment of attornies—

To enter upon plantation &c.

To manage same, and remit produce.

To receive and recover rents and produce.

(*a*) Where the power is given to more than two persons, jointly and severally, it can only be exercised by the whole jointly, or by each separately, and not jointly by any number less than the whole: and therefore a letter of attorney to three persons, *conjunctim et divisim*, to deliver seisin or perform any other act, cannot be executed by two the third being absent, this being neither "*conjunctim*" nor "*divisim.*" Co. Litt. 181. b.; Com. Dig. *Attorney*, c. 11. But the Courts readily avail themselves of any clause or expression in the power which may enable them to avoid this rigid and inconvenient construction; and therefore, in a late case, where A. constituted fifteen persons his attornies *jointly and separately*, for him and in his name to sign and underwrite all such policies of insurance, as they, his said attornies, *or any of them*, jointly and separately, should think proper: it was held, that a policy signed by four was within the scope of the power, the latter words, in which the discretion was given to "any" of them, being considered as controlling the former. *Guthrie* v. *Armstrong*, 5 Barn. & Ald. 628. To prevent any question of this nature, the power should be framed as in the precedent in the text.

Joint and several power, how construed.

BY TRUSTEES FOR SALE, UNDER AN EXPRESS AUTHORITY TO APPOINT ATTORNIES.

sons whom it doth, or shall, or may concern, all and every sum and sums of money, debts, dues, claims, and demands whatsoever, in the said island of Jamaica, which now are or hereafter shall be due, owing, or belonging unto them the said [*constituents*], as such trustees as aforesaid, or the survivors or survivor of them, for, or in respect, or on account of the rents, profits, and produce of the said plantation and sugar-work, lands, tenements, slaves, hereditaments, and premises; And upon receipt thereof or of any part thereof to give and execute receipts, releases, or other sufficient discharges for the same; And on non-payment thereof, or of any part thereof, to sue and prosecute for the same, and to take, use, and prosecute all such legal and proper executions, suits, means, modes, and expedients, for recovery thereof, as shall or may be necessary; [Also to appear for them the said [*constituents*], or the survivors or survivor of them, and their or his persons or person to represent in any Court or Courts of law or equity in the said island of Jamaica, and there to sue and prosecute or answer and defend any action or actions, suit or suits brought or to be brought by or against them or any of them, touching or concerning the premises.] And the said [*constituents*], as such trustees as aforesaid, *Do*, and each of them *Doth*, hereby further authorize and empower the said [*attornies*], or any or either of them, for and in the names or name of them the said [*constituents*], as such trustees as aforesaid, or the survivors or survivor of them, to carry into execution the several trusts in them reposed by the said recited indentures of lease and release, and for that purpose to sell and dispose of and concur with all proper parties in making sale and disposal of the said plantation and sugar-work, lands, tenements, slaves, hereditaments, and premises, comprised in the said hereinbefore recited indentures of lease and release, either together or in parcels, and by public sale, auction, or vendue, or by private contract, to any person or persons, at and for such price and prices, sum or sums of money, as can be reasonably had or gotten for the same; *Also* for them the said [*constituents*], trustees as aforesaid, or the survivors or survivor of them, and in their or his names or name, to make and execute, sign, seal, and as their several and respective

To prosecute or defend actions.

Also to carry into execution the trusts of the recited indenture.

To sell plantation &c.

And execute conveyances.

BY TRUSTEES FOR SALE, UNDER AN EXPRESS AUTHORITY TO APPOINT ATTORNIES.

acts and deeds deliver, all such conveyances and other deeds and assurances in the law as shall be requisite for conveying and assuring the said plantation, lands, tenements, slaves, horses, mares, mules, steers, cattle, stock, hereditaments, and premises, with their and every of their issue, and appurtenances, or such part or parts thereof as shall be so sold, and all the estate, right, and interest of them the said [*constituents*] therein or thereto, unto the respective purchaser or purchasers of the same, his, her, or their heirs and assigns, or as such purchaser or purchasers shall reasonably require, and sign and give to such purchaser or purchasers an effectual receipt, acquittance, and discharge, or effectual receipts, acquittances, and discharges for his, her, or their purchase-money or respective purchase-monies: And generally to do, perform, and execute, all other acts and things, which shall be requisite in or about the premises, as fully and effectually, to all intents and purposes, as they the said [*constituents*], or the survivors or survivor of them, might or could do if personally present; they the said [*constituents*] hereby ratifying, confirming, and agreeing to ratify and confirm, all and whatsoever the said [*attornies*], or any or either of them, shall lawfully do or cause to be done in or about the premises by virtue of these presents. IN WITNESS, &c.

To give receipts for purchase-money.

STAMPS ON LETTERS OF ATTORNEY.

Stamps on powers of attorney, under stat. 55 Geo. 3, c. 184.

Letter of attorney, by any petty officer, seaman, marine, or soldier, serving as a marine, or by the executors or administrators of any such person, for receiving prize money.	0	1	0
——— And for receiving wages.	1	0	0
Letter of attorney for the sale &c. of any of the Government or Parliamentary stocks or funds.	1	0	0
Letter or power of attorney of any other kind, or commission or factory in the nature thereof.	1	10	0
And where the same, together with any schedule or other matter put or indorsed thereon, or annexed thereto, shall contain 2,160 words or upwards, then for every 1,080 words above the first 1,080 words, a further progressive duty of	1	0	0

Exemptions.

Letters of attorney for the receipt of dividends of stock producing a yearly dividend of less than three pounds.

See a point as to the stamp on a power of attorney, *Allen* v. *Morrison*, 8 Barn. & Cress. 565, *S. C.* 3 Man. & Ryl. 70, stated *post*, Vol. 8.

LETTER OF LICENSE.

For LETTER OF LICENSE, *see* LICENSE, LETTER OF, *post*, p. 198.

LETTERS PATENT.

LETTERS PATENT.

LETTERS PATENT GRANTING *the* EXCLUSIVE *Property in a new Invention.*

Recital of petition.

GEORGE THE FOURTH, &c. TO ALL TO WHOM THESE PRESENTS SHALL COME, *Greeting:* WHEREAS [*patentee*], of &c., hath by his petition humbly represented unto us, that in consequence of discoveries made by himself, and communications made to him by foreigners residing abroad, he is in possession of certain improvements in steam-carriages, and which steam-carriages are capable of transporting merchandise of all kinds, as well as passengers, upon common roads, without the aid of horses; that the same are now in this kingdom, and have never been practised herein by any other person or persons whatsoever to his knowledge or belief; the petitioner therefore most humbly prayed, that we would be graciously pleased to grant unto him, his executors, administrators, and assigns, our Royal Letters Patent, under the Great Seal of our United Kingdom, for the sole use, benefit, and advantage of the said invention, within England, Wales, and the town of Berwick-upon-Tweed, and also in all our colonies and plantations abroad, for the term of fourteen years, pursuant to the statute in that case made and provided; And we being willing to give encouragement to all arts and inventions which may be for the public good, are graciously pleased to condescend to the petitioner's request.

Grant of sole privilege to use and vend invention.

KNOW YE THEREFORE, that we, of our special grace, certain knowledge, and mere motion, *Have* given and granted, and by these presents, for us, our heirs and successors, *Do* give and grant unto the said [*patentee*], his executors, administrators, and assigns, our especial license, full power, sole privilege, and authority, that he the said [*patentee*],

his executors, administrators, and assigns, and every of them, by himself and themselves, or by his and their deputy or deputies, servants or agents, or such others as he the said [*patentee*], his executors, administrators, or assigns, shall at any time agree with, and no others, from time to time and at all times hereafter, during the term of years herein expressed, shall, and lawfully may, make, use, exercise, and vend the said invention, within that part of our United Kingdom of Great Britain and Ireland called England, our dominion of Wales, and town of Berwick upon Tweed, and also in all our colonies and plantations abroad, in such manner as to him the said [*patentee*], his executors, administrators, and assigns, or any of them, shall, in his or their discretion, seem meet; and that he the said [*patentee*], his executors, administrators, and assigns, shall and lawfully may have and enjoy the whole profit, benefit, commodity, and advantage, from time to time coming, growing, accruing, and arising, by reason of the said invention, for and during the term of years herein mentioned; To HAVE, HOLD, exercise, and enjoy the said license, powers, privileges, and advantages hereinbefore granted, or mentioned to be granted, unto the said [*patentee*], his executors, administrators, and assigns, for and during and unto the full end and term of fourteen years from the date of these presents, next and immediately ensuing, and fully to be complete and ended, according to the statute in such case made and provided. *And* to the end that he the said [*patentee*], his executors, administrators, and assigns, and every of them, may have and enjoy the full benefit, and the sole use and exercise of the said invention, according to our gracious intention hereinbefore declared, We do by these presents, for us, our heirs, and successors, require, and strictly command, all and every person and persons, bodies politic and corporate, and all other our subjects whatsoever, of what estate, quality, degree, name, or condition soever they be, within that said part of our United Kingdom of Great Britain and Ireland called England, our dominion of Wales, and town of Berwick upon Tweed, and also in all our colonies and plantations abroad, aforesaid, that neither they, nor any of them, at any time during the continuance of the said term of fourteen years hereby granted, either di-

LETTERS PATENT.

Habendum.

No person to infringe patent.

LETTERS PATENT.

rectly or indirectly, do make, use, or put in practice the said invention or any part of the same, so attained unto by the said [*patentee*] as aforesaid, nor in anywise counterfeit, imitate, or resemble the same, nor shall make, or cause to be made, any addition thereunto or subtraction from the same, whereby to pretend himself or themselves the inventor or inventors, devisor or devisors thereof, without the license, consent, or agreement of the said [*patentee*], his executors, administrators, or assigns, in writing, under his or their hands and seals, first had and obtained in that behalf, upon such pains and penalties as can or may be justly inflicted on such offenders for their contempt of this our royal command, and further to be answerable to the said [*patentee*], his executors, administrators, and assigns, according to law, for his and their damages thereby occasioned. *And moreover*, we do by these presents, for us, our heirs, and successors, will and command all and singular the justices of the peace, mayors, sheriffs, bailiffs, constables, headboroughs, and all other officers and ministers whatsoever, of us, our heirs, and successors, for the time being, that they or any of them do not nor shall at any time hereafter during the said term hereby granted, in anywise molest, trouble, or hinder the said [*patentee*], his executors, administrators, or assigns, or any of them, or his or their deputies, servants, or agents, in or about the due and lawful use and exercise of the aforesaid invention, or any thing relating thereto. *Provided always*, and these our letters patent are and shall be upon this condition, that if, at any time during the said term hereby granted, it shall be made appear to us, our heirs or successors, or any six or more of our or their privy council, that this our grant is contrary to law, or prejudicial or inconvenient to our subjects in general, or that the said invention is not a new invention, as to the public use and exercise thereof in that said part of our United Kingdom of Great Britain and Ireland called England, our dominion of Wales, and town of Berwick upon Tweed, and also in all our colonies and plantations abroad, aforesaid, or not first introduced therein by the said [*patentee*] as aforesaid, then, upon signification or declaration thereof, to be made by us, our heirs or successors, under our or their signet or privy seal, or by the

Proviso for making void patent, if contrary to law, or the invention is not new.

lords and others of our or their privy council, or any six or more of them, under their hands, these our letters patent shall forthwith cease, determine, and be utterly void, to all intents and purposes, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding. *Provided also*, that these our letters patent, or any thing herein contained, shall not extend or be construed to extend to give privilege unto the said [*patentee*], his executors, administrators, or assigns, or any of them, to use or imitate any invention or work whatsoever, which hath heretofore been found out or invented by any other of our subjects whatsoever, and publicly used or exercised in that said part of our United Kingdom of Great Britain and Ireland called England, or dominion of Wales, or town of Berwick upon Tweed, or in our colonies and plantations abroad aforesaid, unto whom our letters patent or privileges have been already granted, for the sole use, exercise, and benefit thereof: It being our will and pleasure that the said [*patentee*], his executors, administrators, and assigns, and all and every other person and persons to whom like letters patent or privileges have been already granted as aforesaid, shall distinctly use and practise their several inventions by them invented and found out, according to the true intent and meaning of the same respective letters patent and of these presents. *Provided likewise* nevertheless, and these letters patent are upon this express condition, that if the said [*patentee*], his executors, or administrators, or any person or persons who shall or may, at any time or times hereafter during the continuance of this grant, have or claim any right, title, or interest, in law or equity, of, in, or to the power, privilege, and authority of the sole use and benefit of the said invention hereby granted, shall make any transfer or assignment, or any pretended transfer or assignment of the said liberty or privilege, or any share or shares of benefit or profit thereof, or shall declare any trust thereof, to or for any number of persons exceeding the number of five, or shall open or cause to be opened any book or books for public subscriptions to be made by any number of persons exceeding the number of five, in order to the raising any sum or sums of money under pretence of carrying on the said liberty or privilege hereby granted, or shall by himself or themselves,

LETTERS PATENT.

Patent not to prejudice any patent previously granted.

Patent to be void, if patentee assign &c. to more than five persons.

LETTERS PATENT.

his or their agents or servants, receive any sum or sums of money whatsoever of any number of persons exceeding in the whole the number of five, for such or the like intents or purposes, or shall presume to act as a corporate body, or shall divide the benefit of these our letters patent, or the liberty and privileges hereby by us granted, into any number of shares exceeding the number of five, or shall commit or do, or procure to be committed or done, any act, matter, or thing whatsoever during such time as such person or persons shall have any right or title either in law or equity in or to the said premises, which will be contrary to the true intent and meaning of a certain act of Parliament, made in the sixth year of the reign of our royal ancestor King George the First, intituled "An Act for the better securing certain powers and privileges intended to be granted by his Majesty, by two charters, for assurance of ships and merchandises at sea, and for lending money upon bottomry, and for restraining several extravagant and unwarrantable practices therein mentioned;" or in case the said power, privilege, or authority, shall at any time hereafter become vested in or in trust for more than the number of five persons, or their representatives, at any one time, (reckoning executors or administrators as and for the single person whom they represent, as to such interest as they are or shall be entitled to in right of such their testator or intestate), that then and in any of the said cases, these our letters patent, and all liberties and advantages whatsoever hereby granted, shall utterly cease, determine, and become void, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding;

Stat. 6 Geo. 1, c. 18.

Specification to be enrolled.

Provided also, that if the said [*patentee*] shall not particularly describe and ascertain the nature of his said invention, and in what manner the same is to be performed, by an instrument in writing under his hand and seal, and cause the same to be enrolled in our high Court of Chancery, within six calendar months next and immediately after the date of these our letters patent, all liberties and advantages whatsoever hereby granted shall utterly cease, determine, and become void, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding; *And lastly*, we do by these presents, for us, our heirs, and successors, grant unto the said [*patentee*], his execu-

tors, administrators, and assigns, that these our letters patent, or the enrolment or exemplification thereof, shall be in and by all things good, firm, valid, sufficient, and effectual in the law, according to the true intent and meaning thereof, and shall be taken, construed, and adjudged in the most favourable and beneficial sense for the best advantage of the said [*patentee*], his executors, administrators, and assigns, as well in all our Courts of record as elsewhere, and by all and singular the officers and ministers whatsoever of us, our heirs, and successors, in that part of our said United Kingdom of Great Britain and Ireland called England, our dominion of Wales, and town of Berwick-upon-Tweed, and also in all our colonies and plantations abroad aforesaid, and amongst all and every the subjects of us, our heirs, and successors, whatsoever and wheresoever, notwithstanding the not full and certain describing of the nature or quality of the said invention, or of the materials thereto conducing and belonging. IN WITNESS whereof we have caused these our letters to be made patent. Witness ourself at our palace at Westminster, the —— day of ——, in the —— year of our reign.

By Writ of Privy Seal.

LETTERS PATENT.

Patent to be construed favourably.

LICENSE.

LICENSE *by the* PATENTEE *of a* NEW INVENTION *by Deed poll, to cease on the Death of the Licensee, or on Alienation, &c.*

LICENSE BY A PATENTEE.

TO ALL TO WHOM THESE PRESENTS SHALL COME, [*patentee*], of &c., *Sends Greeting:* WHEREAS his late Majesty King George the Third, by letters patent, bearing date the —— day of ——, granted unto the said [*patentee*]

LICENSE BY A PATENTEE.

the sole and exclusive license, power, privilege, and authority, of making, using, and vending a certain machine [*describe invention*] for the term of fourteen years from the date thereof; AND WHEREAS, for the purpose of promoting the adoption and sale of the said invention, the said [*patentee*] hath agreed to permit [*licensee*], of the city of ——, to make, sell, and dispose of the same upon the terms and conditions, and in the manner, hereinafter mentioned. NOW THESE PRESENTS WITNESS, that, in consideration of the sum of £——, paid by the said [*licensee*] to the said [*patentee*], at or immediately before the execution of these presents, the receipt whereof the said [*patentee*] doth hereby acknowledge, and from the same and every part thereof doth hereby discharge the said [*licensee*], his executors, administrators, and assigns, the said [*patentee*] *Hath* given and granted, and by these presents *Doth* give and grant unto the said [*licensee*], full and free license, privilege, and permission, to make, use, exercise, sell, and dispose of [*invention*], in the said letters patent mentioned or referred to, according to the specification thereof duly enrolled, for the term of —— years from the date hereof; PROVIDED ALWAYS, and these presents are upon this express condition, that if the said [*licensee*] shall depart this life, or shall at any time hereafter assign or make over the license hereby given, or the benefit thereof, or of any part thereof, to any person or persons whomsoever, or the same shall by any other means become vested in any other person or persons, without the consent in writing of the said [*patentee*], his executors or administrators, these presents and every thing herein contained shall cease and be utterly void, to all intents and purposes whatsoever (*a*). IN WITNESS whereof, the said

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Whether a license may be granted to more than five persons.

(*a*) A question has sometimes been raised, whether a license comes within the terms of the clause in patents restraining the patentee from assigning to a larger number of persons than five (*vide ante*, p. 185). There is certainly ground to contend that it does not, for it gives the licensee no interest in the patent, but simply operates as a waiver *pro tanto* of the exclusive right granted by the patent, and is one of the means of promoting the use of the invention. In an instance, however, which has been kindly communicated to the editor, he understands that Sir *Robert* (afterwards

[*patentee*] hath hereunto set his hand and seal this —— day of ——. LICENSE BY A PATENTEE.

Lord) *Gifford* and Sir *J. S. Copley* (now Lord *Lyndhurst*) when attorney and solicitor-general, unhesitatingly expressed an opinion on a case laid before them, that a license was within the prohibitory clause in question. This of course would make it most important, that licenses should invariably contain a restriction on alienation without the consent of the patentee: otherwise the patent might be rendered void by the license getting into the hands of a plurality of persons, so as to make the whole number of persons interested more than five.

Restriction on assignment does not extend to assignments by operation of law.

It has been determined, however, that the proviso in patents restricting assignment, does not extend to assignments by operation of law; and therefore, where, by the effect of the bankruptcy of the patentee, more than five persons became interested in the patent, (*there being more than five creditors*), it was held that the patent was not affected, on the ground, that the clause in question only applied to an assignment by the act of the party, and not to an assignment under a commission of bankrupt. Mr. Justice *Bayley* relied upon the fact of the assignees being included in the term "representatives." *Bloxam* v. *Elsee*, 5 Barn. & Cress. 169.

LICENSE *by* PATENTEE *of the exclusive Liberty to use* INVENTION *within a* CERTAIN DISTRICT, *and containing some* SPECIAL PROVISIONS.

THIS INDENTURE, made the —— day of ——, BETWEEN [*patentee*] of the one part, and [*licensee*] of the other part: WHEREAS his Majesty's letters patent, bearing date the —— day of ——, have been granted to the said [*patentee*] for an improved apparatus for the purpose of evaporating ——, and certain other letters patent, bearing date the —— day of ——, have been granted to the said [*patentee*], for an improvement in the process of manufacturing —— and in refining —— and other substances; AND WHEREAS the said [*patentee*] has assigned the said several patents, and all benefits arising from the said

Parties.

Recital of patents.

That patentee had assigned

LICENSE BY A PATENTEE.

inventions, to [*assignees of patents*], of the city of London, excepting and reserving all rights and interests therein so far as concerns the city of —— and twelve miles round the same; AND WHEREAS the said [*patentee*] has agreed with the said [*licensee*] to grant him a license for the exclusive use of the said several patent inventions in the city of —— and within twelve miles round the same, during the remainder of the several terms of such patents respectively, and to enter into a covenant to grant unto the said [*licensee*] license to use and practise all other improvements which shall be made or invented by the said [*patentee*], at any time within the space of ten years hence next ensuing, so far as such improvements can be applied to the process of ——, for the term of ten years from the date thereof, and whether the said [*patentee*] shall obtain a patent or patents for such improvement or improvements or not, upon the terms, and in manner, and subject to the stipulations hereinafter mentioned or referred to. Now THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the reservations and covenants hereinafter contained on the part of the said [*licensee*] to be paid and performed, he the said [*patentee*] *Doth* give and grant unto the said [*licensee*], his executors, administrators, or assigns, full and free liberty, license, and authority, to use and practise the said two several patent inventions during all the remainder now to come and unexpired of the respective terms granted by the said letters patent respectively, at his manufactories in —— street and —— street, or either of them, or elsewhere in the city of ——, or at any other place or places within twelve miles thereof, for his and their own use and benefit; YIELDING AND PAYING therefore unto the said [*patentee*], his executors, administrators, or assigns, the sum of £——, for every hundred weight of —— which he the said [*licensee*], his executors, administrators, or assigns, shall, during the continuance of the said terms respectively, melt and refine according to the methods prescribed by the said several letters patent and the specifications of the said inventions duly enrolled, or either of them, and also the like sum of £—— for every hundred weight of ——, in which the quantity so melted and refined as aforesaid shall fall short and be deficient in

the patents, except as to a certain district.

Agreement to grant license in respect of such district.

Testatum.

Grant of license for the whole duration of patents.

Reddendum.

LICENSE BY A PATENTEE.

the quantity of —— hogsheads at the least, during each successive period of —— years arising within the respective terms hereby granted; AND in consideration of the premises, the said [*licensee*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*patentee*], his executors, administrators, and assigns, that he the said [*licensee*], his executors, administrators, or assigns, shall and will, during the respective terms hereby granted, pay or cause to be paid to the said [*patentee*], his executors, administrators, or assigns, the sum of —— for every hundred weight of ——, which he the said [*licensee*], his executors, administrators, or assigns, shall melt or refine according to the method of the said two several patents or specifications, or either of them; *And* also the like sum of £—— for every hundred weight of ——, in which the quantity of —— so melted or refined upon the said patent methods shall fall short and be deficient of the quantity of —— hogsheads at the least, during each successive period of —— years accruing within the said respective terms hereby granted (*a*); *And that* the said [*licensee*], his executors, administrators, or assigns, shall and will, at the end of each successive quarter of a year from the day of the date of these presents, deliver to the said [*patentee*], his executors, administrators, or assigns, a just and true account in writing of all the —— which he the said [*licensee*] shall have melted and refined in the quarter of a year then ending, according to the methods prescribed by the said letters patent and specifications, or either of them, and shall and will thereupon pay or cause to be paid to him the said [*patentee*], his executors, administrators, and assigns, at or after the rate of ——

Covenant by licensee to pay —— *per* hundred weight for —— in which the patent shall be used, and also for the deficiency on a certain quantity.

To deliver quarterly accounts.

(*a*) It is not accurate in these cases to provide, as is sometimes done, that the quantity shall be of a given amount, as the object of the covenantee is simply to compel the licensee to pay, whether he uses the patent or not, and not to compel him to use it at all events. The simplest mode of doing this seems to be to reserve, as in the text, so much a hundred weight (or other denomination of weight or measure,) for the whole quantity in which the patent shall be used, and the same for the amount of the deficiency (if any) in the prescribed quantity.

LICENSE BY A PATENTEE.

for every hundred weight of —— so melted and refined; *And also* that the said [*licensee*] will, at the end of each successive period of —— years accruing during the said respective periods hereby granted, pay unto the said [*patentee*], his executors, administrators, and assigns, the like sum of —— for every hundred weight of ——, in which the quantity of —— melted and refined within such period shall have fallen short and been deficient in the said quantity of —— hogsheads at the least, stipulated to be melted and refined within the said period as aforesaid (*b*); *And* the said [*patentee*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*licensee*], his executors, administrators, and assigns, that the said several patents are now good, valid, and subsisting in the law for all the purposes therein respectively expressed, and are not nor is either of them surrendered, forfeited, or become void or voidable; *And that* the specifications of the said several inventions are truly and duly made and enrolled according to the conditions in the said letters patent respectively contained; *And also* that he the said [*patentee*] now hath in himself good right, full power, and lawful and absolute authority, to give and grant to the said [*licensee*], his executors, administrators, or assigns, the full and free license and authority to use the said patent inventions according to the true intent and meaning of these presents; *And also* that he the said [*patentee*], his executors, administrators, or assigns, shall not nor will at any time hereafter permit or suffer any person or persons whomsoever, other than the said [*licensee*], his executors, administrators, or assigns, to use or exercise the said patent inventions, or either of them, within the said city of —— or twelve miles thereof, except —— of the same city of ——, to whom the said [*patentee*] hath granted or is now about to grant license or

To pay for deficient quantity.

Covenant by patentee that patent is valid, &c.

Not to suffer any other person to use patent except ——.

(*b*) Sometimes in these cases an agreement is added, that if in any given period a licensee pays for a deficient quantity, he shall be at liberty at any future period (having worked the stipulated quantity in such period) to work the deficiency so paid for without any additional payment. See a clause of this nature in a coal-mine lease, *ante*, p. 34.

authority for that purpose; *And that* the right to use the said two several patent inventions to the extent and in the manner and form, and subject to the reservation and exceptions hereinbefore mentioned, shall and may be quietly and peaceably exercised, used, and enjoyed, by the said [*licensee*], his executors, administrators, or assigns, without any let, suit, denial, interruption, or disturbance whatsoever, by or from any person or persons whomsoever; *And also* that he the said [*patentee*], his executors and administrators, and all and every other person or persons having or claiming any right or interest to or in the said patents or either of them, shall and will, at all times hereafter, at the request, costs, and charges of the said [*licensee*], his executors, administrators, or assigns, make, do, execute, and perfect every such act, deed, matter, and thing as shall be necessary for vesting in the said [*licensee*], his executors, administrators, or assigns, the full and absolute license and authority to use the said patent inventions in manner and form, and subject to the reservations, restrictions, and exceptions aforesaid; *And also* that in case of any infringement of the said patents, or either of them, by any person or persons whomsoever, which shall obstruct, lessen, or interfere with the license or authority hereinbefore granted to the said [*licensee*], his executors, administrators, and assigns, he the said [*patentee*], his executors, administrators, or assigns, will, at the costs and charges of the said [*licensee*], his executors, administrators, or assigns, and for his or their benefit, commence all proper and necessary proceedings, either at law or in equity, against such person or persons, and carry on such proceedings to effect, so as to obtain damages for such infringement, and prevent the continuance thereof; *And further*, that if at any time or times hereafter within the term of ten years now next ensuing, he the said [*patentee*] shall invent, discover, or make any other improvement or improvements which can or may be applied to the process of refining ——, then and in any and every such case, he the said [*patentee*] shall and will communicate such improvement or improvements to him the said [*licensee*], his executors, administrators, or assigns, when and as soon as it shall appear that the same can or may be applied as aforesaid, and if he or they shall approve of the same, then

LICENSE BY A PATENTEE.

—For quiet enjoyment.

For further assurance.

To bring actions for infringement.

To give the licensee the benefit of further improvements.

LICENSE BY A PATENTEE.

he the said [*patentee*] shall and will grant to him or them license and authority to use and practise the same for the residue which shall be then unexpired of the terms hereby granted, or either of them, and that whether the said [*patentee*] shall have obtained his Majesty's patent therefore or not (*b*). IN WITNESS, &c.

(*b*) For clauses restrictive of alienation, *vide ante*, p. 188, and *post*, p. 197. If the license is to cease at the death of the licensee, of course it should be confined to him, and not extended to his executors or administrators.

LICENSE BY A PATENTEE.

LICENSE *by* PATENTEE *to Two Persons, Partners, for a certain Term; with a* POWER *of* DISTRESS *for the annual Sum agreed to be paid by Licensees; and special* RESTRICTION *on* ALIENATION, *&c.*

THIS INDENTURE, made the —— day of ——; BETWEEN [*patentee*], of &c., of the one part; and [*licensees*], of &c., co-partners in trade, of the other part. Recital. WHEREAS *(recite patent granting the exclusive use of a certain machine for manufacturing ——)*; AND WHEREAS, for the mutual benefit and advantage of the said [*patentee*] and [*licensees*], and to promote and extend the sale of the said invention, the said [*patentee*] hath agreed to grant to the said [*licensees*] his license to use and sell the same in manner hereinafter contained. *Testatum.* NOW THIS INDENTURE WITNESSETH, that, in consideration of the rent hereinafter reserved, and the covenants hereinafter contained on the part of the said [*licensees*], their executors, administrators, and assigns, to be performed, the said [*patentee*] Grant of license. doth hereby grant unto the said [*licensees*], and each of them, their and each of their executors, administrators, and assigns, license, power, and authority during the period of

—— years from the date of these presents, to use, work, and exercise the said machine, and to vend and sell the —— which shall be made or manufactured therefrom, for their and his benefit and advantage; reserving nevertheless unto the said [*patentee*], his executors, administrators, or assigns, and all persons who shall be duly licensed by him or them, the power to use and work and exercise the said machine, and to vend and sell the —— which shall be made therefrom, and all other powers, privileges, and authorities granted by the said letters patent to the said [*patentee*], his executors, administrators, and assigns, and reserving and retaining the sole right of suing at law or in equity for all infringements of the said letters patent, and of receiving and recovering for his and their own use all damages and costs to be awarded and recovered in any and every such suit or action: YIELDING AND PAYING therefore, unto the said [*patentee*], his executors, administrators, or assigns, during the said term of —— years, or during so long as the license hereby granted shall continue valid and in force, the yearly rent or sum of £——, without any deduction whatsoever, by four equal quarterly payments, on the —— day of ——, the —— day of ——, the —— day of ——, and the —— day of —— in every year, the first payment to be made on the —— day of —— next; And the said [*licensees*] do hereby for themselves, their heirs, executors, administrators, and assigns, jointly, and each of them doth hereby for himself, his heirs, executors, administrators, and assigns severally, covenant and agree with the said [*patentee*], his executors, administrators, and assigns, that they the said [*licensees*], their executors, administrators, or assigns, will from time to time during the said term of —— years, duly pay to the said [*patentee*], his executors, administrators, or assigns, the said annual sum of £——, at the times and in the manner hereinbefore appointed for the payment thereof; And that in case any or either of the said quarterly payments shall be in arrear for the space of —— days after any or either of the said days of payment, it shall be lawful for the said [*patentee*], his executors, administrators, or assigns, to enter into and upon the manufactory, warehouse, and buildings of the said [*licensees*] at ——, and distrain

LICENSE BY A PATENTEE.

Reddendum.

Joint and several covenant by licensees to pay rent.

That patentee may distrain.

LICENSE BY A PATENTEE.

and sell the said machine, and all the [*manufactured material*] or materials belonging to the said [*licensees*], or either of them, their, or either of their executors or administrators, or any other goods and chattels which shall be found there, in the same manner, and as effectually to all intents and purposes as landlords may distrain for rent in arrear; And that they the said [*licensees*], their executors, administrators, or assigns, will not remove the same machine without the consent in writing of the said [*patentee*], his executors, administrators, or assigns; And that it shall be lawful for the said [*patentee*], his executors, administrators, or assigns, at any time to enter the said manufactory and buildings at —— aforesaid, for the purpose of ascertaining that the same has not been removed; And that the said [*licensees*], their executors, administrators, and assigns, will use their utmost endeavours to detect all infringements on the said patent, and assist the said [*patentee*], his executors, administrators, or assigns, in preventing the same, or prosecuting any action or suit for obtaining redress or reparation for the same (*a*); And further, that in case any of the said quarterly payments hereinbefore reserved shall be in arrear for the space of —— days, and no sufficient distress can be had for recovery thereof as aforesaid, or if the said [*licensees*], their executors, administrators, or assigns, shall neglect or fail to perform any of the covenants herein contained, it shall be lawful for the said [*patentee*], his executors, administrators, or assigns, by any deed or writing under his or their hand and seal, to revoke and annul these presents, he or they giving —— days' notice in writing to the said [*licensees*], or one of them, their or one of their executors, administrators, or assigns, of such revocation, or leaving the same at their or his last or usual

Not to remove machine without consent.

That patentee may enter to ascertain that machine is not removed.

To assist patentee in protecting patent against infringement.

That, in default of distress, or in case of breach of covenant, patentee may revoke license.

(*a*) Sometimes a clause to this effect is added—

"And that the said [*licensees*], their executors, administrators, or assigns, shall not make, use, exercise, or work any machine or machines for making ——, other than such as are licensed by the said [*patentee*], his executors, administrators, or assigns."

LICENSE BY A PATENTEE.

Warranty.

place of abode; AND the said [*patentee*], for himself, his heirs, executors, and administrators, doth hereby warrant unto the said [*licensees*], their executors, administrators, and assigns, the enjoyment and benefit of the license, power and authority, and privileges hereby granted, for the period, upon the terms and stipulations, and in manner aforesaid, according to the true intent and meaning of these presents. AND WHEREAS in the letters patent obtained by the said [*patentee*] is the following proviso, *(Copy restriction against assignment)*. Now it is hereby declared and agreed by and between the said parties to these presents, that if by the act or default of the said [*licensees*], or either of them, their or either of their executors, administrators, or assigns, or without their or his act or default, or by any other means howsoever, the benefit of the license hereby granted shall belong to or become vested in more than two persons, who would thereby become assignees of, or persons interested in the power, privilege, or authority of the sole use and benefit of the said invention granted by the said letters patent, within the intent and meaning of the said recited proviso therein contained, then these presents and the license hereby granted, and every clause, matter, and thing herein contained, shall immediately thereupon cease and be void, any thing hereinbefore contained to the contrary notwithstanding (*b*).

Recital of restriction in patent against assignment.

License to be void if the number of persons interested in patent is increased by the act of the parties.

(*b*) This clause is presented to the learned reader's consideration, in consequence of the opinion before adverted to, (*vide ante*, p. 188), that a license granted to more than five persons would avoid a patent. It throws upon the licensee the necessity of ascertaining this point, in support of his license, and restricts his power of disposition only so far as it might be exercised to the subversion of the patent.

LICENSE, LETTER OF (*a*).

LETTER OF LICENSE.

LETTER OF LICENSE *by* CREDITORS.

TO ALL TO WHOM THESE PRESENTS SHALL COME, we whose respective names and seals are hereunder subscribed and set, creditors of [*licensee*], of ——, in the county of ——, maltster, respectively *Send Greeting:* WHEREAS the said [*licensee*] is and stands justly indebted to us his creditors, in several sums of money, which, by reason of losses and other misfortunes, he is at present unable to pay and satisfy, and therefore he hath desired our license for two years, to proceed in the management and transaction of his affairs and business, and to collect and get in his debts, goods, and effects, in order to make us the best satisfaction in his power; Now we the said creditors of the said [*licensee*], considering the circumstances of the said [*licensee*], and for the purposes aforesaid, severally and respectively, and for our several respective heirs, executors, and administrators, but not for each other, or the heirs, executors, or administrators of each other, *Have* given and granted, and by these presents *Do* give and grant unto the said [*licensee*] (*b*), full, free, and safe license and liberty to come, go, pass, and repass from place to place, where his business and occasion shall require, within the United Kingdom of Great Britain and Ireland, from the day of the date of these presents for the space of two years, for the getting in, receiving, and recovering of his debts, goods, and effects, adjusting and settling his accounts, and transacting his affairs and business, in order to the satisfying our several and respective debts, without any suit, molestation, or interruption, of or by us his said creditors, our heirs, executors, administrators,

Recital of debtor's inability to pay his debts.

Creditors grant him license for two years to carry on his affairs;

(*a*) As to deeds of composition and inspectorship, and trust-deeds for the benefit of creditors generally, see *post*, title "TRUST DEEDS" and in the General Index, "DEBTOR AND CREDITOR."

(*b*) If it is to extend to the representatives of the debtor, add—

"his heirs, executors, and administrators."

LETTER OF LICENSE.

partners, or assigns respectively; And we, his said creditors, for ourselves and our respective heirs, executors, or administrators, but not for each other, or for the heirs, executors, or administrators of each other, do hereby severally covenant and agree with the said [*licensee*], that we or any of us, or the executors or administrators of us or any of us (*c*), will not, at any time hereafter during the said space of two years, sue, arrest, prosecute, molest, or trouble, attach, seize, sequester, or extend the said [*licensee*], or his lands, goods, chattels, or estate, for or concerning the debts now to us severally and respectively due from him upon any security, or otherwise, or for any other matter, cause, or thing whatsoever; And that these presents shall or may be pleaded and allowed, and produced in evidence, in any court or courts, in bar or discharge of all or any actions, suits, judgments, or executions which shall or may be brought, commenced, and sued, prosecuted, awarded, or recovered against the said [*licensee*], or his goods or estates, by or at the suit of us his said creditors or any of us, or any other person or persons by or through our or any of our means, act, privity, order, consent, or procurement, for our said respective debts, or any of them, within the said period of two years from the date hereof (*d*). PROVIDED NEVERTHELESS, and it is hereby declared, that if the said [*licensee*] shall die or leave his habitation and place of abode, and abscond from his creditors at any time during the said space of two years, or if all the now creditors of the said [*licensee*],

And agree not to sue him for their respective debts.

That this indenture may be pleaded in discharge of any action, &c. brought by the creditors.

Proviso for avoiding license in case licensee dies or absconds.

(*c*) The executors or administrators should be mentioned; for, according to some early authorities, they are not bound unless named. *Carvell* v. *Edwards*, 1 Show. 330; *S. C.* Holt, 546.

(*d*) This clause should never be omitted; because it has been decided, that a covenant simply not to sue *within a definite time*, (as distinguished from a *general* covenant not to sue), cannot be pleaded in bar to an action; but the covenantee is driven to an action of covenant. *Ayloffe* v. *Scrimpshire*, Carth. 63; *S. C.* Salk. 573; 1 Ld. Raym. 690; 1 Show. 46, 331; *Carvell* v. *Edwards*, Carth. 210; *S. C.* Holt, 546; see also *Deux* v. *Jefferies*, Cro. El. 352. It should be observed, that a covenant generally not to sue, though it discharges the covenantee, does not discharge third persons from debts owing by the covenantee jointly with such persons. *Hutton* v. *Eyre*, 1 Marsh. 603. In order to be pleaded in bar to an action for a specialty debt, the letter of license must be under seal. *Lowe* v. *Eginton*, 7 Price, 604. And see 3 Chitty's Commerc. Law, 688.

Necessity of declaration that letter of license may be pleaded in bar to an action.

LETTER OF LICENSE.

whose debts amount to the aggregate sum of £——, or some person or persons by them duly authorized, shall not seal and execute these presents on or before the —— day of —— next, then, in all or any of the said cases, these presents, and the license and liberty hereby given, shall thenceforth cease and be void (*e*). PROVIDED ALSO, and it is hereby declared, that nothing herein contained shall in any manner delay, hinder, prejudice, or affect the claims or remedies of us the creditors of the said [*licensee*] respectively, against any person or persons who is or are liable to the payment of any of the said debts of the said [*licensee*] as a surety or sureties for him or otherwise, but each and every of us his said creditors shall or may have the same actions and remedies at law and in equity against such person or persons as we respectively should have had if these presents had not been made, any rule of law or equity to the contrary notwithstanding (*f*). IN WITNESS, &c.

Sureties not to be affected.

(*e*) Sometimes it is declared that in case any of the creditors sue the debtor, he shall be absolutely discharged from the debt or debts for which such action shall be brought, as follows:—

If any action is brought, this instrument may be pleaded in bar.

"And further, that if any action, suit, judgment, or other proceeding, shall be brought, commenced, sued, or prosecuted by us, or any of us, against the said [*licensee*], his lands, goods, chattels, or estate, contrary to the covenant hereinbefore contained, then these presents shall or may be pleaded and shewn in bar to and discharge of such action, suit, judgment, or other proceeding; and the said [*licensee*], his heirs, executors, and administrators, shall thenceforth and for ever be absolutely released and discharged from the debt or demand, or respective debts or demands, for which such action, suit, judgment, or other proceeding shall have been brought, commenced, sued, or prosecuted as aforesaid."

(*f*) This clause qualifies, and, to a certain extent, defeats the covenant to give time to the debtor, for, if any creditor were to sue a surety, the surety would have an immediate right of action against the debtor in respect of the sum so recovered, and by this means the creditor's demand would indirectly come upon him before the stipulated time. Without a clause of this kind, however, the surety would be discharged. See this subject fully discussed, *ante*, Vol. 3, p. 195, 2nd edit.; *vide* also Vol. 6, p. 130.

LIMITED LETTERS OF ADMINISTRATION.

LIMITED LETTERS *of* ADMINISTRATION *with the Will annexed,* de bonis non, *for the purpose of* ASSIGNING *a* TERM (*a*).

PREROGATIVE.

ON the —— day of ——, in the year of our Lord ——, before the Worshipful [*surrogate*], Doctor of Laws, Surrogate, in his chambers, Doctors Commons, London, present the subscribed Notary Public.

A BUSINESS of granting LETTERS of ADMINISTRATION, with the last Will and Testament annexed, of the goods, chattels, and credits of [*deceased testator*], late of ——, in the county of Oxford, deceased, left unadministered by [*deceased executors*], deceased, whilst living, the executors of the said will, to [*limited administrator*], of Gray's Inn, in the county of Middlesex, gentleman, as a person for that purpose named by and on the part and behalf of [*owner in fee*], gentleman, under the limitations hereinafter mentioned.

Under £100.
[*Proctor*].

ON which day [*proctor*] for testator extracted a special proxy, under the hand and seal of the said [*owner in fee*],

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(*a*) Where there is no legal personal representative of a deceased trustee of an attendant term, it frequently becomes necessary to obtain a limit-

LIMITED LETTERS OF ADMINISTRATION.

and made himself a party for him, and alleged that in and by a certain indenture of four parts, bearing date the eleventh

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ed administration, *i. e.* an administration constituting a representative *quoad* the term, which the Ecclesiastical Court will grant at the instance of the owner of the inheritance as a matter of course. The circumstances under which such an administration must be applied for are, where the termor is dead intestate, and there has been no general administration granted of his effects, or the person to whom such administration has been granted is dead, testate or intestate, or the executor of the termor is dead intestate, or without having proved the will. Roll. Ab. 907, pl. 10; *Isted* v. *Stanley*, Dy. 372 a; and see *ante*, Vol. 1, pp. 399, 400. See also *Tingrey* v. *Brown*, 1 Bos. & Pul. 310.

Cautions to be observed in taking out limited administration.

In all these cases, the chain of representation being broken, recourse must be had to a limited administration; in obtaining which, the point principally requiring attention is, to ascertain that it is taken out in the proper Court: if no administration has previously been taken out, and the termor died in the diocese in which the lands are situate, and there is no reason to suspect that he had effects constituting *bona notabilia* in any other diocese, then an original limited administration may be taken out in the Consistory Court of that diocese. So, if a prior administration has been granted by the Consistory Court of the diocese in which the testator died and the lands are situate, a limited administration *de bonis non* may be obtained in such Court. But if there has been a prior administration, granted either by another Consistory Court, or by the Prerogative Court, or the termor died or had effects in another diocese, a prerogative administration must be obtained, which will be original if there has been no prior administration in that Court, (for the fact of there having been a prior administration in an Episcopal Court will not prevent its being original *here*), or, if not, will be *de bonis non*. The advantage of a prerogative administration is, that it is good until actually vacated, though the testator had not *bona notabilia* in two dioceses, so as to found the jurisdiction.

In the preceding observations, it has been assumed that the lands of which the deceased termor died possessed, are in the province in which the prior administration has been taken out; but if this be not the case, *i. e.* if the lands be in the province of York and the administration was granted by the Prerogative Court of Canterbury, or *vice versâ*, a new original administration must be obtained in the other province, either in an Episcopal or Archiepiscopal Court, as the case may be, precisely in the same manner as if no administration at all had been previously taken out.

LIMITED LETTERS OF ADMINISTRATION.

day of August, one thousand seven hundred and forty-nine, and made between ——of ——, in the county of ——, widow and executrix of the will of [*trustee of term*], late of —— in the said county of ——, gentleman, deceased, of the first part; R. W., of ——, in the said county of ——, gentleman, of the second part; W. B., of ——, in the said county of ——, esquire, of the third part; and the said [*deceased testator*], by his name and description of J. A. of —— aforesaid, yeoman, of the fourth part; it is recited, that, by indenture of mortgage, bearing date the ——day of ——, one thousand seven hundred and fourteen, and made or mentioned to be made between [*mortgagor*] of the one part, and [*mortgagee*] of the other part; the said [*mortgagor*] in consideration among other things of the sum of one hundred and fifty pounds to him paid by the said

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It should be observed that where probate or administration has been granted by an Archdeaconry Court, this does not prevent a limited administration from being obtained in the Episcopal Court; but it was lately held, that where the bishop gave his commissary power to prove the wills of all persons deceased within a certain archdeaconry, the commissary was authorized to grant probate of a will of a person dying in that archdeaconry, though he had a term of years in another archdeaconry; though it was contended that the commissary could have had no power to seize a term of years in lands which did not lie in his archdeaconry, and therefore had not the means of enforcing probate; but the Court observed, that the appointment of the bishop, as it regarded the power of the commissary to prove wills, armed him with episcopal authority for that purpose. The grant of the power attracted to it all the means by which the power could be exercised. The *King* v. *Yonge*, 5 Mau. & Selw. 119.

The expense of obtaining limited administration may sometimes be saved by inducing the persons entitled to administer, *i. e.* the next of kin of the deceased, to apply for a general administration; and the cost is borne by the person at whose instance it is obtained. In the case of small properties, the expense of a limited administration is heavily felt, especially where the deeds, through which the deduction of title to the terms is to be traced, are numerous: for it is the practice of the officers of the Ecclesiastical Court, who prepare these instruments, to state the deeds at great length; but this may be in part prevented, by furnishing them with a short abstract only of each deed, which is quite sufficient, and is all that can reasonably be required.

LIMITED LETTERS OF ADMINISTRATION.

[*mortgagee*], did grant and to farm let unto the said [*mortgagee*], *(set forth parcels as described in deed);* and the reversion and reversions, remainder and remainders, rents, issues, and profits of the said premises, and all his estate and interest therein; To HOLD the same with the appurtenances unto the said [*mortgagee*], his executors, administrators, and assigns, for the term of five hundred years, subject to a proviso, to make void the same on payment of the sum of one hundred and fifty-three pounds fifteen shillings, as therein mentioned; And it is further recited, that, by indenture quadrupartite, bearing date the —— day of ——, one thousand seven hundred and twenty-eight, and made or mentioned to be made between the said [*administrator of mortgagee*], administrator with the will annexed of the said [*mortgagee*] deceased, of the first part; [*heir of mortgagor*], eldest son and heir of the said [*mortgagor*] deceased, of the second part; the said [*purchaser*], of the third part; and the said [*trustee to prevent dower*], of the fourth part; after reciting that the said [*purchaser*] had contracted with the said [*heir of mortgagor*], for the absolute purchase of the said recited premises, it is witnessed, that, in consideration of the sum of one hundred and two pounds ten shillings, to the said [*administrator of mortgagee*] paid by the said [*purchaser*], in full for all principal and interest monies due upon the said last recited indenture of mortgage, and for other considerations, the said [*administrator*], by the direction of the said [*heir of mortgagor*], did assign and transfer unto the said [*trustee*], at the nomination of the said [*purchaser*], All the before recited premises granted to the said [*mortgagee*] deceased as aforesaid, and all the estate and interest of the said [*administrator*] in the said premises; To HOLD the same with the appurtenances unto the said [*trustee*], his executors, administrators, and assigns, for the residue of the said term of five hundred years, *In trust* for the said [*purchaser*], his heirs, appointees, and assigns, to go along with the freehold and inheritance of the said premises, *And it is* by the said indenture of the eleventh of August, one thousand seven hundred and forty-nine, after further reciting that the said [*second purchaser*] had contracted with the said [*first purchaser*] for the absolute purchase

LIMITED LETTERS OF ADMINISTRATION.

of the said recited premises with their appurtenances, *Witnessed*, that, for the considerations therein mentioned, the said [*executrix of trustee of term*], at the request and by the direction of the said [*first purchaser*], and on the nomination of the said [*second purchaser*], testified as therein mentioned, did assign and transfer unto the said [*deceased testator*] all the before-recited parcels of arable land and meadow ground, and all and singular other the premises which were granted to the said [*mortgagee*] deceased as aforesaid, and all the estate and interest of her the said [*executrix of trustee of term*] therein, *To hold* the same with the appurtenances unto the said [*deceased testator*], his executors, administrators, and assigns, for the residue of the said term of five hundred years; *In trust* for the said [*second purchaser*], his heirs, and assigns, to go along with the freehold and inheritance of the said premises (as in and by the said indenture of the eleventh day of August, one thousand seven hundred and forty-seven, produced and shewn to the surrogate, reference being thereto had, will appear); And the said [*proctor*] further alleged, that the said [*deceased testator*] hath since departed this life without having made any assignment of the said term of five hundred years, having made and duly executed his last will and testament in writing, and thereof appointed [*executors*], executors, who in the month of April one thousand seven hundred and fifty-six, duly proved the same in the said Prerogative Court of Canterbury, (as by the acts and records of the said Court, reference being thereunto had, will appear), and for some time intermeddled in the goods, chattels, and credits of the said deceased; that the said [*surviving executor*] survived the said [*deceased executor*], but is since also deceased, intestate, leaving some part of the said goods, chattels, and credits unadministered and not fully disposed of, and no letters of administration with the said will annexed of the goods of the said [*deceased testator*], deceased, left unadministered as aforesaid, have been granted to any person by the authority of this Court, and there is not now any legal representative of him the said [*deceased testator*], deceased; And further alleged that his party, the said [*owner in fee*], of &c., by divers

LIMITED LETTERS OF ADMINISTRATION.

mesne conveyances, devises, or other good and sufficient assurances in the law, is become entitled to the freehold and inheritance of the said several parcels of arable land and meadow ground and premises, with the appurtenances, comprised in the said term of five hundred years, and has also the sole equitable right, title, and interest in and to the remainder of the said term therein granted, assigned as aforesaid, and now to come and unexpired, but cannot make a legal title thereto for want of a representative of him the said [*deceased testator*], deceased, and that the said [*owner in fee*] has in and by the said proxy by him exhibited, authorized and empowered him to pray and procure letters of administration with the said will annexed, of the goods, chattels, and credits of the said [*deceased testator*], deceased, left unadministered as aforesaid, and under the limitations hereinafter mentioned, to be conveyed and granted to the said [*limited administrator*] as a person for that purpose named by and on his part and behalf; Wherefore he prayed, and the surrogate aforesaid at his petition decreed letters of administration with the said will annexed, of the said goods, chattels, and credits of the said [*deceased testator*], deceased, limited so far as concerns all his estate, right, title, and interest, in and to the said several parcels of arable land and meadow ground, and premises aforesaid, with their appurtenances, comprised in the said term of five hundred years, and the residue of the said term therein granted and assigned as aforesaid, and now to come and unexpired, and all benefit and advantage to be had, received, and taken thereupon, but no further or other, or in any other manner whatsoever, to be conveyed and granted to the said [*limited administrator*] as a person for that purpose named by and on the part and behalf of the said [*owner in fee*]. And the said [*limited administrator*] being present in judgment, and accepting thereof, the surrogate aforesaid administered to him an oath well and faithfully to administer, and that the whole of the goods, chattels, and credits of the said [*deceased testator*], deceased, as limited, do not amount in value to the sum of one hundred pounds. WHICH I ATTEST.

LIMITED ADMINISTRATION *granted by the Prerogative Court of Canterbury of a* TERM *of* YEARS, *a former general Administration* durante minoritate, *having ceased by the Death of the Minor.*

LIMITED LETTERS OF ADMINISTRATION.

PREROGATIVE.

ON, &c. *(ut ante,* p. 201*).*

A BUSINESS of granting LETTERS of ADMINISTRATION, of the goods, chattels, and credits of [*deceased*], late of the parish of —— in the county of Middlesex, deceased, to [*limited administrator*], of —, aforesaid, gentleman (*a*), as a person for that purpose named by and on the part and behalf of [*owner of the inheritance*], of Newington, in the county of Surry, Esq., under the limitations hereinafter mentioned. The letters of administration granted in the month of November, one thousand eight hundred and ——, to [*former administrator*], the uncle and curator, or guardian lawfully assigned, to —— a minor, the natural and lawful and only child of the said deceased, during her minority, having ceased and expired by reason of the death of the said minor in her minority.

ON which day [*proctor*] extracted a special proxy under the hand and seal of the said [*owner in fee*], and made himself a party for him, and alleged that in and by a certain indenture of six parts, bearing date the —— day of ——, 1794, and made between W. T. of &c.,

(*a*) It saves expense to name, as the limited administrator, some person who can personally attend at the Court to take the oath, which must otherwise be administered by commission.

LIMITED LETTERS OF ADMINISTRATION.

and —— his wife, of the first part; T. H. of &c., of the second part; R. S. of &c., of the third part; J. B. of &c., of the fourth part; the said [*deceased*], by his name and description of &c., of the fifth part; and J. M. of &c., of the sixth part; after reciting that by indentures of lease and release, bearing date respectively the —— and —— days of May, 1793, the release being of four parts, and made or mentioned to be made between the said W. T. of the first part; T. A. of &c., (assignee of the residue of the term of one thousand years, by the said indenture in recital assigned, In trust for the said W. T., his heirs and assigns, to attend and wait upon the freehold and inheritance of the premises therein and hereinafter mentioned), of the second part; the said T. H. of the third part, and the said R. S. of the fourth part; the said T. A., for the better securing to the said T. H. the payment of the sum of two hundred pounds and interest, and for other the considerations therein mentioned, did at the request of the said W. T., and at the nomination of the said T. H., bargain and assign unto the said R. S. ALL THAT *(describe parcels)* and all the estate and interest of him the said T. A. therein: *To hold* the same with the appurtenances unto the said R. S., his executors, administrators, and assigns, for the residue of the said term of one thousand years; *In trust* for the said T. H., his heirs and assigns, subject nevertheless to a proviso for redemption, on repayment of the said sum of two hundred pounds and interest, as therein mentioned. It is recited that the said W. T. had contracted with the said J. B. for the absolute sale and assurance to him of the piece of land hereinafter mentioned, (part of the said piece of ground granted and released to the said T. H., his heirs and assigns, in mortgage as aforesaid). And it is further recited, that the said sum of two hundred pounds was then due and owing to the said T. H., all interest thereon having been paid, and that it had been agreed that the same should be paid off and discharged out of the purchase-money. *It is by the said indenture witnessed,* that in consideration of the said sum of two hundred pounds, to the said T. H. paid by the said J. B. by the direction of the said W. T., and for other the considerations therein mentioned, the said R. S., by the direction as well of the said T. H. as of the said W. T.,

LIMITED LETTERS OF ADMINISTRATION.

and at the nomination of the said J. B., testified as therein mentioned, did bargain, assign, and set over unto the said [*deceased*], *All that (describe parcels)*, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate and interest of him the said R. S. therein, *To hold* the same with the appurtenances unto the said [*deceased*], his executors, administrators, and assigns, for the residue of the said term of one thousand years, Upon trust, nevertheless, for the said J. B., his heirs and assigns, to go along with the freehold and inheritance of the said premises, and protect the same from all mesne and subsequent assignments, charges, and incumbrances, (as in and by the said recited indenture of the —— of August, 1794, produced and shewn to the surrogate appeared). And the said [*proctor*] further alleged, that the said [*deceased*] hath since departed this life, without having made any assignment thereof, intestate, and in the month of November, 1805, letters of administration of all and singular the goods, chattels, and credits of the said [*deceased*], were granted by the authority of this Court to [*former administrator*], the uncle and curator, or guardian lawfully assigned to [*minor*], spinster, a minor, the natural and lawful daughter and only child of the said deceased, for her use and benefit, until she should attain the age of twenty-one years; and the said [*minor*] hath since also departed this life, before having attained the said age of twenty-one years, whereby the letters of administration of the goods of the said deceased, granted to the said [*former administrator*], as aforesaid, have ceased and expired, and no other letters of administration of the goods of the said deceased have been granted to any person by the authority of this Court, and there is not now any legal representative of him the said [*deceased*], deceased. And the said [*proctor*] further alleged, that his party, the said [*owner in fee*], of &c., by divers mesne conveyances, devises, or other good and sufficient assurances in the law, is become entitled to the freehold and inheritance of a piece or parcel of ground, situate in the said parish of —— &c. *(describe it)*, being part of the said piece of ground, and several messuages or tenements by the said first recited indenture of the —— of August, 1794, assign-

LIMITED LETTERS OF ADMINISTRATION.

ed to the said [*deceased*], with their appurtenances, and has also the sole equitable right, title, and interest, in and to the remainder of the said term of one thousand years, therein granted and assigned as aforesaid, and now to come and unexpired, but cannot make a legal title thereto, for want of a representative of him the said [*deceased*], deceased, to convey and assign the remainder of the said term so as aforesaid vested in him; That his said party has, in and by the said proxy by him exhibited, authorized and empowered him to pray and procure letters of administration of the goods, chattels, and credits of the said [*deceased*], deceased, under the limitations hereinafter mentioned, to be committed and granted to the said [*limited administrator*], as a person for that purpose named by and on his part and behalf. WHEREFORE he prayed, and the surrogate aforesaid at his petition decreed, letters of administration of the goods, chattels, and credits of the said [*deceased*], deceased, limited so far as concerns all his estate, right, title, and interest in and to the said piece or parcel of ground and dwelling-house, with the appurtenances, being part and parcel of the said piece or parcel of ground, and several messuages or tenements by the said recited indenture of the —— of August, 1794, assigned to the said [*deceased*] as aforesaid, comprised in the said term of one thousand years, and the residue of the said term therein granted and assigned as aforesaid, and now to come and unexpired, and all benefit and advantage to be had, received, and taken therefrom, but no further or other, or in any other manner whatsoever, to be committed and granted to the said [*limited administrator*], as a person for that purpose named by and on the part and behalf of the said [*owner in fee*]; and the said [*limited administrator*] being present in judgment and accepting thereof, the surrogate aforesaid administered to him an oath well and faithfully to administer, and that the whole of the goods, chattels, and credits of the said [*deceased*], deceased, as limited, do not amount in value to the sum of one hundred pounds. WHICH I ATTEST.

(Notarial Seal).

MEMORIALS (*a*).

Memorials of lands in Middlesex.

Stat. 7 Ann. c. 20.

Memorials of all deeds and wills affecting lands in Middlesex to be registered.

Otherwise to be void against subsequent purchasers, &c.

BY various acts of Parliament, memorials of deeds affecting lands in the counties of Middlesex and York, and the county of the town of Kingston upon Hull, are for certain purposes required to be registered. The stat. 7 Ann. c. 20, enacts that a memorial of all deeds and conveyances, and of all wills and devises in writing, of or concerning and whereby any honors, &c. or hereditaments in the county of Middlesex may be any way affected in law or equity, may be registered as thereinafter directed (*b*); and that every such deed or conveyance shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial thereof be registered before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mort-

(*a*) As to the memorial required by the Annuity Acts, *vide ante*, Vol. 2, p. 319. By the Bedford Level Act, 15 Car. 2, c. 17, all conveyances and charges, except leases for seven years, of the ninety-five thousand acres therein comprised, are required to be registered. (The other acts relating to the Bedford Level, are stat. 11 Geo. 3, c. 78; 36 Geo. 3, c. 73; 1 & 2 Geo. 4, c. 64).

Practice of the registry-office in regard to the contents of the memorial.

(*b*) More of the deed is usually set forth in the memorial than the act requires; indeed the practice of the registry office in many respects is not strictly conformable to the requisitions of the act. The discrepancies have been pointed out by Sir E. B. Sugden with his usual ability, see Vend. & Purch. 8th ed. 697. Where the practice requires something which the act does not, there is the less reason for objection, (if a compliance with it in the particular case be feasible), than where it falls short of the legislative requisition; in which case, a memorial received at the office may yet be unavailing for the purposes of the act; for it is scarcely necessary to observe, that the reception of the memorial is by no means conclusive evidence of its sufficiency, though, in points admitting of doubt, it is probable that the Courts would be influenced by the practice.

MEMORIALS UNDER THE REGISTRY ACTS.

gagee shall claim. And that every such devise by will shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial of such will be registered at such times and in such manner as is in the said act directed.

Memorials how to be executed.

Sect. 5, enacts that all and every memorials so to be registered, shall be put into writing in vellum or parchment, and brought to the office appointed for registering; and in case of deeds and conveyances, shall be *under the hand and seal of some or one of the grantors, or some or one of the grantees, his or their heirs, executors, or administrators, guardians, or trustees* (*c*), *attested by two witnesses, one whereof to be one of the witnesses to the execution of such deed or conveyance* (*d*); which witness shall upon his oath, before one of the said registers or masters, or before a master in

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Whether the heir &c. executing the memorial should also execute the deed.

(*c*) The act evidently only requires the heirs, executors, &c. of the party, to sign and seal the *memorial;* but Mr. Rigge (Rigge on Registry, p. 74), suggests that, from the indistinctness of the clause, the instrument to be registered should, notwithstanding it is already sufficiently executed for general legal purposes, be signed and sealed by the party requiring the registry, as if he were a party in his own right. The clause, however, seems to be sufficiently definite: it simply requires the memorial to be thus executed, and its execution to be proved by one of the witnesses to the deed, which requisition cannot be considered as implying that the deed and memorial shall be executed by the same parties. The practice, however, of making the heir &c., execute the deed as well as the memorial (which the editor understands is not invariably insisted on,) can do no harm, provided the witness deposing to his execution of the deed and memorial is one of the attesting witnesses to the execution of the deed by one of the original parties; but this is material to be attended to, for if the construction of the act contended for in the preceding observations be correct, it would not be sufficient that such witness had attested the execution by the heir &c. requiring the memorial. The practice has also obtained at the office, when the witnesses to the original execution by the party cannot be procured, of making one of the parties re-execute the deed for the purpose of the registry. To this practice Sir E. B. Sugden also objects, on the ground that the Legislature, in requiring execution to be proved, must have intended an operative execution.

Whether proof of execution by *grantee* be sufficient.

(*d*) Sir E. B. Sugden thinks, (V. & P. 687), that, though the memorial may be executed, either by the grantor or grantee, yet, that the witness making the affidavit should be a witness to the execution by the party from whom the estate moves. The practice however is, to admit the witness who has attested the execution by *either* party, (see Rigge, p. 74); and

MEMORIALS UNDER THE REGISTRY ACTS.

Chancery, ordinary or extraordinary, prove the signing and sealing of such memorial, and the execution of the deed or conveyance mentioned in such memorial; and in case of wills, the memorial shall be under the hand and seal of some or one of the devisees, his or their heirs, executors, administrators, guardians, or trustees, attested by two witnesses, one whereof shall, upon his oath, before the said registers or masters, or before such master in Chancery as aforesaid, prove the signing and sealing of such memorial, (which respective oaths the said registers or masters, and masters in Chancery, are thereby empowered to administer), and shall indorse a certificate thereof on every such memorial, and sign the same.

Contents of memorial.

Sect. 6.—That every memorial of any deed, conveyance, or will, shall contain the day of the month and the year when such deed, conveyance, or will bears date, and the names and additions of all the parties to such deed or conveyance, and of the devisor or testatrix of such will, and of all the witnesses to such deed, conveyance, or will, and the places of their abode, and shall express or mention the honors, manors, lands, tenements, and hereditaments contained in such deed, conveyance, or will, and the names of all the parishes, townships, hamlets, precincts, or extra-parochial places within the said county, where any such honors, &c. are lying, that are given, granted, conveyed, devised, or any ways affected or charged by any such deed, conveyance, or will, *in such manner as the same are expressed or mentioned in such deed, conveyance, or will,* or to the same effect. And that every such deed, conveyance, and will, or probate of the same, of which such memorial is so to be registered as aforesaid, shall be produced to the said registers or masters at the time of entering such memorial, who shall indorse a certificate on every such deed, conveyance, and will, or probate thereof, and therein mention the certain day, hour, and time on which such memorial is so entered or registered, expressing also in what book, page, and number, the same is entered; and that the said re-

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this, it is probable, would be held to be sufficient, for it seems difficult to support Sir E. B. Sugden's hypothesis upon the terms of the act. The word "execution" it is conceived, must be taken to refer to an execution by either of the parties immediately before mentioned, and this construction seems to be somewhat aided by the subsequent clause in regard to wills, which requires the memorial to be executed by the devisee, thereby indicating that the Legislature had not exclusively in view the authentication of the execution of instruments by the person from whom the estate moved. It is better, however, to avoid the question, where practicable, by procuring the witness attesting the execution by the grantor, to make the deposition before the register.

MEMORIALS UNDER THE REGISTRY ACTS.

gisters or masters shall sign the said certificate when so indorsed, which certificate shall be taken and allowed as evidence of such respective registries in all courts of record whatsoever. (The act then directs the manner of keeping the register).

Where there are more writings than one—description of parcels in one, sufficient.

Sect. 7.—That where there are more writings than one for making and perfecting any conveyance or security, which do name, mention, or any ways affect or concern the same honors, &c., it shall be a sufficient memorial and register thereof, if all the said honors, &c. and the parishes, townships, hamlets, or extra-parochial places wherein the same lie, be only once named or mentioned in the memorial or register of any one of the deeds or writings, made for the perfecting of such conveyance or security; and that the dates of the rest of the said deeds or writings relating to the said conveyance or security, with the names and additions of the parties and witnesses, and the places of their abodes, be only set down in the memorials and registers of the same, with a reference to the deed or writing whereof the memorial is so registered, that contains or expresses the parcels mentioned in all the said deeds, and directions how to find the registering the same (*e*).

Memorials of wills, when to be registered.

Sect. 8.—That memorials of wills that shall be registered within six months after the death of devisor, dying within Great Britain, or within three years after the death of devisor, dying upon the sea or beyond the seas, shall be as valid against subsequent purchasers, as if registered immediately after the death.

In case of concealment or contesting of will.

Sect. 9.—That in case the devisee, &c. by reason of the concealment or suppression, or contesting such will, or other inevitable difficulty without his, her, or their wilful neglect and default, shall be disabled to exhibit a memorial within the respective times aforesaid; and that a memorial shall be entered of such contest or other impediment within two years after the death of such devisor, who shall die within Great Britain, or within four

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Whether sufficient to refer to former memorialised deed containing the description.

(*e*) This clause only relates to cases where there are several instruments intended to operate as one conveyance, and, as Sir E. B. Sugden suggests, cannot make it sufficient, in the registry of an assignment of a lease (as is the practice), to refer to the parcels in the lease, provided it has been previously memorialised. Possibly, indeed, under the prior clause requiring the honors, &c. to be mentioned or expressed in the memorial, a reference to any part of the rolls, containing a description of the lands, would be held to be sufficient. The clause in question, however, making an exception in the case of several deeds operating as one conveyance, affords an argument against this construction, which, therefore, ought not to be relied on. It would be applicable of course as well to other instruments as assignments of leases.

years after the decease of such person who shall die upon the sea or beyond the seas, then the registry of the memorial within six months after his, her, or their attainment of such will, or a probate thereof, or removal of the impediment, shall be a sufficient registry (*f*).

Protection to purchasers against concealed will.

Sect. 10.—That, in case of the concealment or suppression of any will, any purchaser shall not be disturbed, unless the will be registered within five years after the death of the devisor.

Certificate of the discharge of mortgages to be registered.

Sect. 16.—That in case of mortgages, whereof memorials shall be entered in the register's office pursuant to this act, if at any time afterwards a certificate shall be brought to the said registers or masters, signed by the mortgagee or mortgagees in such mortgage, his, her, or their executors, administrators, or assigns, and attested by two witnesses, whereby it shall appear that all monies due upon such mortgage have been paid or satisfied, which witnesses shall upon their oaths, before the said registers or masters, or before a master in Chancery, ordinary or extraordinary, prove such monies to be satisfied or paid accordingly, and that they saw such certificate signed by the said mortgagee or mortgagees, his, her, or their executors, administrators, or assigns, that then the said registers or masters shall make an entry in the margents of the said register books against the registry of the memorial of such mortgage, that such mortgage was satisfied and discharged according to such certificate, to which the same entry shall refer, and shall after file such certificate, to remain upon record in the said register office (*g*).

Act not to extend to copyholds, &c.

Sect. 17.—Act not to extend to copyholds (*h*) or to leases at a rack-

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(*f*) Mr. Rigge suggests, (p. 84, n.), that wills and probates, and copies of wills which have not been registered within the period directed by the statute, might, if subsequently registered, operate against subsequent purchasers, but there is certainly ground to contend that the clauses of the act requiring the registration within this period, render it absolutely void against purchasers or mortgagees from the heir, if not done within the time specified. The act does not authorize the registration of copies of wills, though they are received in the office.

(*g*) Certificates of the discharge of judgments, rules of Courts of law, decrees or orders of Courts of equity, and writs of execution, are frequently registered (see Rigge, 83, 149); and there is a convenience in the practice, as to judgments, inasmuch as they appear as incumbrances on the rolls; but, as the registration is not directed by the act, it is wholly inoperative.

(*h*) It is usual, however, and seems to be a prudent precaution, to regis-

MEMORIALS UNDER THE REGISTRY ACTS.

rent, or to any lease not exceeding twenty-one years, where the actual possession and occupation go along with the lease (*i*), or to any of the chambers in Serjeants Inn, the inns of Court or Chancery.

Judgments, statutes, and recognizances, (other than those of the crown) to be registered.

Sect. 18.—That no judgment, statute, or recognizance, (other than such as shall be entered in the name and upon the proper account of her Majesty, her heirs, and successors), shall affect or bind any honors, &c. in Middlesex, but from only the time that a memorial of such judgment, &c. shall be entered at the said register office, expressing and containing, in case of such judgment, the names of the plaintiffs, and the names, additions, and places of abode, if any such be in such judgment, of the defendants, the sums thereby recovered, and the time of the signing thereof; and in case of statutes and recognizances expressing and containing the date of such statute or recognizance, the names, additions, and places of abode of the cognizors and cognizees therein, and for what sums, and before whom the same were acknowledged; and that, in order to the making an entry of such memorials of judgments, statutes, and recognizances, as aforesaid, the party and parties desiring the same shall produce to and leave with the said registers or masters, to be filed in the said public or register office, a memorial of such judgment, statute, or recognizance, signed by the proper officer, or his deputy, who shall sign such judgment in the same office, or by the proper officer in whose office such statute or recognizance shall be enrolled, together with an affidavit, sworn before one of the judges at Westminster, or a master in Chancery, that such memorial was duly signed by the officer whose name shall appear to be thereunto set; which memorial such respective officer is required to give such plaintiff or plaintiffs, cognizee or cognizees, or his, her, or their executors, or administrators, or attornies, or any of them, he, she, or they, paying for the same the sum of one shilling.

Register to give certificate.

Sect. 19.—The register to make an entry, and, if required, give a certificate in writing under his hand, testified by two credible witnesses, of every such memorial of any judgment, statute, or recognizance, brought to him to be so registered as aforesaid, and therein mention the certain

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ter leases of copyholds, granted by license or custom for more than twenty-one years.

As to the registration of assignments of leases.

(*i*) Where the assignment is by way of mortgage, in which case the "possession and occupation" generally do not "go along with the lease," the lease and assignment, though the lease does not exceed twenty-one years, should be registered. In other cases, *i. e.* where the possession and occupation do accompany the lease, there seems to be no pretence for requiring the registry, although the lease be assigned for a valuable consideration.

day on which such memorial is so registered or entered, expressing also in what book, page, and number the same is entered.

MEMORIALS UNDER THE REGISTRY ACTS.

By stat. 2 & 3 Ann. c. 4, all deeds and wills affecting lands in the West-Riding of Yorkshire, are to be registered at the office at Wakefield; and the memorial must be under the hand and seal of some or one of the grantors or grantees, or devisees, or his or their *guardians or trustees*. Where the deeds are executed within forty miles of the West-Riding, the witness must attend at the office; but in other cases the affidavit may be sworn before one of the judges at Westminster or a master in Chancery.

Stat. 2 & 3 Ann. c. 4, relating to the West-Riding of Yorkshire.

Wills of persons dying within the kingdom of England, or the dominion of Wales, or Berwick, must be registered in six months, and of persons dying beyond the seas within three years, or in case of impediment within six months after its removal.

Stat. 6 Ann. c. 35, established an office at Beverley for the registry of deeds relating to the East-Riding of York, and Kingston upon Hull, and contains the same provisions as are in the Middlesex act in regard to the execution of the memorial by *heirs, executors, administrators, guardians or trustees, the registration of judgments, statutes, and recognizances*, and certificates of mortgages being discharged, (but which are to be signed by both *mortgagor* and mortgagee, in the presence of the register or his deputy), and applies these provisions to all lands in the West-Riding, the mortgage or purchase whereof shall exceed fifty pounds. By this act judgments, statutes, and recognizances must be registered within thirty days after the signing or acknowledgment thereof, and certificates of their discharge are authorized to be registered in the same manner as mortgages.

6 Ann. c. 35; East-Riding and Kingston upon Hull.

The stat. 8 Geo. 2, c. 6, relates to the North-Riding, the register office of which is at Northallerton. Here both the witnesses to the memorial (evidently from the inadvertent omission of a few words in the act,) are required to prove its execution; or the party executing the memorial may acknowledge his execution thereof, and of the deed, before the register or his deputy, which is a regulation peculiar to this act. Judgments &c. must be registered within twenty days; the provision as to wills is the same as in the other Yorkshire acts, with the addition that purchasers are not to be affected by any will not registered within three years. By this act also, deeds and wills may be registered at length, and copies are evidence in case of their destruction by fire or other accident; the execution by the grantor or testator must be proved by one of the witnesses; copies so registered have the same effect as a memorial.

Stat. 8 Geo. 2, c. 6, North-Riding.

The Yorkshire acts authorize the enrolment of bargains and sales, on an acknowledgment by the bargainor, or one of the bargainors, taken before a justice of the peace of the Riding in which the enrolment is made, such enrolment to be of the same effect as if made in any of the Courts at Westminster; and the words *grant, bargain*, and *sell*, in the deeds, are to oper-

Enrolment of bargains and sales in Yorkshire.

MEMORIALS UNDER THE REGISTRY ACTS.

ate as covenants for title, quiet enjoyment, and further assurance by the bargainor in respect of the acts of himself and those claiming under him; such enrolments to have the same force as memorials.

In the Ridings of Yorkshire and Kingston upon Hull, it is not usual to insert so much of the deeds as in Middlesex. The office at Beverley (and it is probable that the same rule extends to the offices for the other Ridings,) will not register deeds containing general indefinite descriptions, as of all the property of which a certain person died seised, &c. They require a local description.

Points decided upon the registry acts.

On the preceding statutes the following points have been decided:—1st. That the registration of an appointment in exercise of a power, does not dispense with the necessity of registering the deed creating the power; *Scrafton* v. *Quincey*, 2 Ves. Sen. 413; nor is the registration of an assignment of a lease a sufficient registration of the lease itself. *Honeycomb* v. *Waldron*, 2 Stra. 1064. 2dly. That a clerical inaccuracy does not vitiate the memorial, and therefore, where, in the memorial of an assignment in trust for sale, the name of the trustee was written "Seden" instead of "Soden," and the *habendum* was stated to be to *Cowie* (who was the grantee) instead of *Soden*, Sir *W. Grant*, M. R., held, that the variance did not affect the validity of the registry. *Wyatt* v. *Barwell*, 19 Ves. 435. (It will be observed, that the inaccuracy in this case was palpable upon the face of the memorial, and could not mislead). 3dly. (In regard to the *effect* of registry), That, in *equity*, a purchaser or mortgagee derives no advantage by the registration of his deed against a prior unregistered instrument, *of which he has notice; Hine* v. *Dodd*, 2 Atk. 275; *Le Neve* v. *Le Neve*, 3 Atk. 646; *Sheldon* v. *Cox*, 2 Ed. 224; *Bushell* v. *Bushell*, 1 Sch. & Lef. 102, 2 Ib. 532; but constructive notice is not sufficient; it must be actual, and must be satisfactorily proved. *Jolland* v. *Stainbridge*, 3 Ves. 478; and other cases, cit. Sugd. V. & P. 7th ed. 697. 4thly. That though this is the rule in equity, the deed first registered must prevail *at law*. *Doe* d. *Robinson* v. *Allsop*, 5 Barn. & Ald. 142. 5thly. That registration is not itself notice; and therefore a purchaser or mortgagee who obtains the legal estate, is not affected by a prior equitable registered incumbrance of which he had no notice *aliunde*. *Morecock* v. *Dickins*, Amb. 678. Sir E. B. Sugden strongly contends against this doctrine, (Sugd. Vend. & Purch. 5th ed. 608 (*k*),) but the Courts seem disposed to adhere to it: the present Chief Baron recognised the doctrine in the late case of *Wiseman* v. *Westland*, 1 Younge & Jervis, 117. As to the necessity of registering equitable charges, see *Hennand* v. *Moore*, 1 Ed. 327.

(*k*) The remarks, however, upon this point have been omitted in the later editions of Sir E. B. Sugden's valuable work.

6thly. That a first mortgagee advancing more money on the security after a second mortgage, which has been registered, *but of which he had no notice*, shall have priority over such second mortgagee in respect of the advances so made. *Bedford* v. *Backhouse*, 2 Eq. Ca. Ab. 615, pl. 12; *Wrightson* v. *Hudson*, Ib. 609, pl. 7. See farther as to registration, Sugd. Vend. & Purch. 7th ed. 697 *& seq;* 2 Cov. Pow. Mortg. 618; Patch, on Mortgages, 342; Coote on Mortgages, 383.

MEMORIALS UNDER THE REGISTRY ACTS.

MEMORIAL *of a* LEASE.

OF A LEASE.

A MEMORIAL to be registered of an indenture of lease, bearing date the —— day of ——, 18—; made between [*lessor*], of the parish of ——, in the county of ——, gentleman, of the one part; and [*lessee*], of —— street, in the city of London, builder, of the other part: WHEREBY the said [*lessor*] did demise unto the said [*lessee*], his executors, administrators, and assigns, ALL THAT messuage, &c. *(here transcribe the description of the parcels from the deed, but omitting the general words* (*a*),*) To hold* to the said [*lessee*], his executors, administrators, and assigns, from the —— day of —— last past, for forty years, at the yearly rent of 15*l.* THE execution of which said indenture of lease is witnessed, as to the said [*lessor*], by [*first witness*], of &c., and [*second witness*], of &c.; and as to the said [*lessee*], by [*first witness*], of &c., and [*second witness*], his clerk; and the same is hereby required to be

(*a*) If the premises be described by reference to a plan, add—

"a map or plan whereof is drawn in the margin of the said indenture, and of this memorial."

Reference to plan.

A copy of the plan should also be made on paper, to be entered in the register's book.

OF A LEASE.

registered by the said [*lessee*]: As WITNESS his hand and seal.

[*Lessee's signature and seal*].

Signed and sealed in the presence of } [A. B.] of &c. (*b*).
[C. D.] of &c.

Affidavit to be made by the attesting witness.

(*b*) If the attesting witness is in town, he should attend at the office in Bell Yard, Lincoln's Inn, with the memorial, where the following oath is administered to him:—"You swear that you saw this memorial signed and sealed, and the deed to which it refers duly executed, by the parties thereto, whose execution you have attested." If the witness cannot personally attend at the office, he should make an affidavit (on parchment) to the following effect:—

"[A. B.] of the city of Norwich, attorney at law, maketh oath and saith, that he, this deponent, was present, and did see [Y. Z.], of the same city, esquire, sign and seal the memorial above written, *(or, if the memorial be not on the same piece of parchment,* 'the memorial hereunto annexed):' and this deponent further saith, that he was present, and did see the deed referred to in such memorial duly signed, sealed, and delivered by the said [Y. Z.], *(or any other party, as the case may be).*

Sworn at the city of Norwich, aforesaid, this —— day of ——, 1828, before me, }

[M. M.]
A Master Extraordinary in Chancery.

OF ASSIGNMENT OF LEASE.

OF *an Indenture of* ASSIGNMENT *of* LEASE.

A MEMORIAL to be registered of an indenture of assignment, bearing date the —— day of ——; made between [*assignor*], of &c., of the one part; and [*assignee*], of &c., of the other part: WHEREBY the said [*assignor*] [for the consideration therein mentioned], did assign to the said [*assignee*] all and singular the messuage or tenement and premises situate in the parish of ——, which are particularly mentioned and set forth in a certain indenture of lease, dated the —— day of ——, made between [*lessor*], therein described, of the one part; and the said [*assignor*], of the other part; a memorial whereof was registered on the —— day of ——, 1820 (*a*); No. ——, B. ——, *To hold* unto the said [*assignee*], his executors, administrators, and assigns, for the residue of the term by the said indenture of lease granted, subject to the rent and covenants in the said indenture of lease contained. WHICH said indenture of assignment is witnessed, as to the sealing and delivery thereof by the said [*assignor*] and [*assignee*], by [*witnesses*], of &c.; and is hereby required to be registered by the said [*assignee*]: AS WITNESS his hand and seal.

(L. S.) [*Assignee's signature*].

Signed and sealed in the presence of } [*Two witnesses*].

(*a*) If the description of the parcels, in deference to the objection before referred to, be repeated in the assignment, instead of the words referring to the memorial, add—

"and which are therein described, as follows:" *(here copy description from lease).*

OF ASSIGNMENT BY DEED POLL INDORSED ON LEASE.

OF *an* ASSIGNMENT *by* DEED-POLL, *indorsed on Lease.*

A MEMORIAL of an assignment by deed-poll, bearing date the —— day of ——, under the hand and seal of [A. B.], of &c., indorsed upon an indenture of lease, bearing date the —— day of——; made between [C. D.], of &c., of the one part; and the said [A. B.], of the other part: BY WHICH said assignment the said [A. B.], for the considerations therein mentioned, did grant, bargain, sell, and assign unto [E. F.], of &c., all that *(describe parcels)*, and the admeasurements thereof are delineated in the plan drawn on the margin of the said deed-poll now being memorialized, and of this memorial, *To hold* unto the said [E. F.], his executors, administrators, and assigns, for all the residue of the term of seventy years, granted by the said indenture of lease, and which commenced on the —— day of ——, subject to the rent and covenants in and by the said indenture of lease reserved and contained. THE execution of which said deed-poll is witnessed by [*witness or witnesses*], of &c.; and the same is hereby required to be registered by the said [*assignor*]. AS WITNESS her hand and seal this —— day of ——, ——.

Signed and sealed in the presence of } [*Two witnesses*].

OF *Conveyance in Fee to a Purchaser by* LEASE *and* RELEASE (*a*).

OF LEASE AND RELEASE.

A MEMORIAL to be registered of indentures of lease and release, bearing date respectively the —— and —— days of —— &c., the lease made between [*vendor*], of the city of ——, gent., of the one part; and [*vendee*], of ——, in the county of ——, esquire, of the other part: and the release made between the said [*vendor*], of the first part; the said [*vendee*], of the second part; and [*trustee*], of the city of ——, gent., of the third part; BY WHICH said lease the said [*vendor*] did bargain and sell unto the said [*vendee*], for one whole year; and by which said release the said [*vendor*], for the considerations therein expressed, did grant, bargain, sell, and release unto the said [*vendee*], his heirs and assigns, ALL THAT *(transcribe parcels)*, with their rights, members, and appurtenances, *To hold* to the said [*vendee*], his heirs and assigns, to certain uses, for the benefit of the said [*vendee*], his appointees, heirs, and assigns, and which are particularly set forth in the said indenture of release. WHICH said indentures of lease and release, as to the execution thereof by the said [*vendor*], are witnessed by [A. Z.], of &c., and [B. Y.], his clerk; and the said indenture of release, as to the execution thereof by the said [*vendee*] and [*trustee*], is witnessed by [R. T.] of ——, in the county of ——, gent.; and the

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(*a*) By the late Stamp Act, 55 Geo. 3, c. 184, a stamp of 10*s*. is imposed on every "memorial to be registered pursuant to any act of Parliament, made or to be made for the public registering of deeds and conveyances in England;" and for every piece of parchment after the first, a progressive duty of 10*s*. Stamps on memorials.

OF LEASE AND RELEASE.

same indentures are hereby required to be registered (*b*) by the said [*vendee*]: As WITNESS his hand and seal.

(L. S.) [*Vendee*].

Signed and sealed in the presence of } [*Two witnesses*].

(*b*) Or if the deed is required to be registered by the heir or devisee of the vendee—

"by M. N. heir-at-law of the said [*vendee*]" *(or as the case may be)* "by M. N., devisee named in the last will and testament of the said [*vendee*]."

DECLARATION OF USES OF FINE.

OF *an* INDENTURE DECLARING *the* USES *of a* FINE.

A MEMORIAL to be registered of an indenture, bearing date &c.; made between [*vendor*], of &c., and [*wife*], his wife, of the first part; [*vendee*], of &c., of the second part; and [*trustee*], of &c., of the third part: WHEREBY it is covenanted and declared that a certain fine *sur conuzance de droit come ceo*, &c., agreed to be levied by the said [*vendor*] and [*wife*], his wife, at the time or times therein mentioned, of and concerning *(describe the parcels according to the deed)*, should enure to the uses, intents, and purposes in the now memorializing indenture contained (*a*). WHICH said indenture is witnessed by [*witness*], of &c., and [*other witness*], of &c., his clerk, and the same is hereby required to be registered by the said [*vendee*]: As WITNESS his hand and seal.

(L. S.) [*Vendee*].

Signed and sealed in the presence of } [*Two witnesses*].

(*a*) Sometimes the uses are set forth, but this is not necessary.

OF *an* ASSIGNMENT *of* TERM *to* ATTEND *the* INHERITANCE, *(written under the Memorial of the last Deeds).*

ASSIGNMENT OF TERM TO ATTEND.

A MEMORIAL to be registered of an indenture, bearing date &c., made between the [*assignor*], of &c., of the first part; the above-named [*vendor*], of the second part; the above-named [*purchaser*], of the third part; and [*assignee*], of &c., of the fourth part: Purporting to be an assignment of a term of one thousand years, to attend the inheritance of the same premises as are mentioned in the above-written memorial. WHICH said indenture of assignment is witnessed as to the execution thereof by the above-named [*assignor*], by [*witness*], of &c.; and as to the execution thereof by the above-named [*vendor*] and [*purchaser*], by [*witness*], of &c.; and is hereby required to be registered by the said [*purchaser*]: AS WITNESS his hand and seal.

Signed and sealed in the presence of } [*Two witnesses*].

MORTGAGE BY WAY OF UNDER LEASE.

OF MORTGAGE *by way of* UNDER-LEASE, *registered at the same Time as the Lease, and written under the Memorial thereof. (Vide Form of Memorial of Lease, ante, p.* 219*).*

A MEMORIAL to be registered of an indenture of under-lease and mortgage, bearing date the —— day of ——, made between the above-named [*mortgagor*], of the one part; and [*mortgagee*], of &c., of the other part: WHEREBY the said [*mortgagor*] did demise unto the said [*mortgagee*], all and singular the premises mentioned and described in the above memorial (*a*), *To hold* to the said [*mortgagee*], his executors, administrators, and assigns, for all the residue of the term granted by the above memorialized indenture, except the last ten days thereof, subject nevertheless to redemption upon payment by the said [*mortgagor*], his heirs, executors, administrators, or assigns, to the said [*mortgagee*], his executors, administrators, or assigns, of the sum of 500*l.*, with interest for the same, at the times and in manner expressed in the indenture now being memorialized. WHICH said indenture of under-lease and mortgage, as to the execution by the said [*mortgagor*], is witnessed by [*witness*], of &c.; and as to the execution by [*mortgagee*], is witnessed by [*other witness*], of &c.; and [*second other witness*], of &c.; and is hereby required to be registered by the said [*mortgagee*]: As WITNESS his hand and seal.

Signed and sealed in the presence of } [*Two witnesses*].

(*a*) If it be thought proper again to describe the parcels, add—"that is to say, *(describe premises).*"

OF MORTGAGE *in* FEE, *by* LEASE *and* RELEASE.

MORTGAGE BY LEASE AND RELEASE.

A MEMORIAL to be registered of indentures of lease and release, bearing date respectively the —— and—— days of ——, &c., the lease made between [*bargainors*], of &c., of the one part; and [*bargainee*], of &c., of the other part: And the release made between the said [*mortgagor*] and [*wife*], his wife, of the first part; the said [*trustee*], of the second part; and the said [*mortgagee*], of the third part: BY WHICH said lease the said [*mortgagor*] and [*trustee*] did bargain and sell unto the said [*mortgagee*], for one whole year, and by which said release the said [*trustee*] did bargain, sell, and release, and the said [*mortgagor*] and [*wife*], his wife, did grant, bargain, sell, release, and confirm, unto the said [*mortgagee*], *(here describe the parcels as in the indenture), To hold* unto and to the use of the said [*mortgagee*], his heirs and assigns for ever, subject nevertheless to redemption, upon payment by the said [*mortgagor*], his heirs, executors, administrators, or assigns, to the said [*mortgagee*], his executors, administrators, or assigns, of the sum of 500*l.* and lawful interest, as in the said indenture of release now to be registered is expressed. WHICH said indentures of lease and release are respectively witnessed, as to the execution thereof by the said [*mortgagor*] and [*trustee*], by [*witness*], of &c., and [*other witness*], his clerk; and the execution of the said release by the said [*wife*], the wife of the said [*mortgagor*], and by the said [*mortgagee*], is also witnessed by the said [*same witnesses*]; and the same are hereby required to be registered by the said [*mortgagee*]: As WITNESS his hand and seal.

Signed and sealed in the presence of } [*Two witnesses*].

CERTIFICATE OF SATISFACTION OF MORTGAGE.

CERTIFICATE *of* SATISFACTION *of* MORTGAGE *applicable to the preceding Indenture.*

TO the Registers for the County of Middlesex, I, [*mortgagee*], of &c., *(or the executor or administrator of the mortgagee, as the case may be (a))*, do hereby certify, that [*mortgagor*], of &c., hath paid and satisfied all monies due and owing upon an indenture of mortgage bearing date the —— day of ——, in the year of our Lord 1812, made between the said [*mortgagor*] and [*wife*], his wife, of the first part; [*trustee*], of &c., of the second part; and me, the said [*mortgagee*], *(or if by an executor or administrator*, " and the said [*mortgagee*] deceased"), of the third part; a memorial whereof was registered on the —— day of the same month of ——, 1812, B. ——, No. ——. AND I do hereby require an entry of such payment and satisfaction to be made in the Register's Book, wherein the same is registered, pursuant to the act of Parliament in that case made and provided: AS WITNESS my hand this —— day of ——, 18—.

Signed, and satisfaction acknowledged, in the presence of } [*Two witnesses*].

(*a*) If the memorial be of lands in the East or West-Ridings of Yorkshire, or in Kingston upon Hull, the mortgagor, or his executor or administrator, must concur in this certificate.

OF *a* GRANT *of* ANNUITY.

GRANT OF ANNUITY.

A MEMORIAL to be registered of an indenture bearing date, &c., made between [*grantor*], of &c., of the first part; [*grantee*], of &c., of the second part; and [*trustee*], of &c., of the third part: WHEREBY the said [*grantor*], for the consideration therein expressed, did grant, bargain, sell, and confirm unto the said [*grantee*] and his assigns, during the natural life of the said [*grantee*], an annuity or clear yearly rent-charge of 50*l.*, to be issuing and payable out of, and charged upon, ALL THOSE pieces or parcels of land, *(describe parcels);* And whereby also the said [*grantor*] did demise unto the said [*trustee*], his executors, administrators, and assigns, the said premises charged as aforesaid, *To hold* the same for the term of ninety-nine years: but, nevertheless, upon the trusts, and for the purposes in the said indenture mentioned. WHICH said indenture now to be registered is witnessed, as to the execution thereof by the said [*grantor*], by [*witness*], of &c., and [*other witness*], of &c., his son; and as to the execution thereof by the said [*grantee*], is witnessed by [*witnesses*]: of &c., and the same indenture is required to be registered by the said [*grantee*]: AS WITNESS his hand and seal.

Signed and sealed in the presence of } [*Two witnesses*].

JUDGMENT.

OF *a* JUDGMENT.

A MEMORIAL to be registered of a judgment in his Majesty's Court of King's Bench, *(or otherwise, as the case may be)*, of Trinity term in the ninth year of the reign of King George the Fourth, Roll No ——, between [A. B.], plaintiff, and [C. D.], defendant; in a plea of debt for 100*l.*, and costs 63*s.*; which judgment was signed in the above cause on the —— day of —— last. Dated the —— day of ——, 18—.

[A. B.], Secondary.

(Then follows this Affidavit.)

[A. B.], clerk to ——, of Lincoln's Inn, in the county of Middlesex, gent., maketh oath, That he was present, and did see [*secondary*], Secondary of the Court of King's Bench, sign the above certificate.

[*Deponent*].

Sworn at the Public Office, in Southampton Buildings, Chancery-lane, this —— day of ——, 18—, before me,

[*Master*].

OF *a* WILL (*a*).

OF A WILL.

A MEMORIAL to be registered of the last will and testament *(or the probate of the last will and testament, as the case may be)*, of [*testator*], late of —— street, in the parish of ——, in the county of ——, deceased, bearing date the —— day of ——: BY WHICH will the said testator (*b*) did give and devise all his real and personal estate and effects whatsoever and wheresoever, unto [*devisees*], their heirs, executors, and administrators, upon the trusts, and for the intents and purposes in such will particularly expressed. WHICH said will was executed by the said testator in the presence of [*three witnesses*], of &c.: and the same is hereby required to be registered by [*devisee*], one of the devisees therein named: AS WITNESS his hand and seal.

Signed and sealed in the presence of } [*Two witnesses*].

(*a*) Much inconvenience arises in practice from the frequency of the neglect to register wills within the period required by the statute. Where the devisee is not the heir, it should never be omitted.

(*b*) Or, if the real estate be devised to uses excluding, or, rather, enabling the devisee to exclude dower—

"Did give and devise all his real estate to such uses as [A.] by deed or will should appoint, and in default of appointment, to him and his heirs for ever." *(Or otherwise, as the case may be).*

Variation where real estate is devised to prevent dower.

MORTGAGES.

GENERAL INTRODUCTORY OBSERVATIONS ON MORTGAGE SECURITIES.

AS TO THE COMPARATIVE ELIGIBILITY OF THE VARIOUS MODES OF FRAMING SECURITIES FOR MONEY, WITH SOME OBSERVATIONS ON TRUSTS FOR SALE, AND COLLATERAL SECURITIES.

As to mortgages by demise.

MORTGAGES by demise for long terms of years were formerly more in use than they now are.—They were attended with this convenience: that, at the decease of the mortgagee, the estate devolved upon the same persons as were entitled to the beneficial interest in the mortgage, namely, the personal representatives of the mortgagee; whereas, in the case of mortgagees in fee, the lands descend to the heir, (unless intercepted by devise), while the money belongs to the executor or administrator. Mortgages by demise had also the advantage of being capable of being effected by a single deed, without enrolment or livery. It has been found, however, that these conveniences attending them are more than counterbalanced by the disadvantage of having a title to a term only, when the mortgagee becomes absolute owner by foreclosure or otherwise. The objection to a term in such a case is, not only that it is a less eligible interest for sale than a fee-simple, but that in deducing the title at any future period, however remote, it becomes necessary to shew the origin of the term, and thereby disclose the mortgage, which is often objectionable, (particularly if the equity of redemption has been acquired by length of possession, and not by decree of foreclosure), and might otherwise, in process of time, be avoided.

The general adoption of powers of sale in mortgages has also contributed to bring mortgages by demise into disuse; for, in such case, for the reasons already suggested, the mortgage should always include the mortgagor's whole estate. And little is now gained by a mortgage for years, in point of expense; for, since the present mode of limiting to uses in favour of a vendee, to prevent dower, has obtained, the owner (if the land were purchased by him), has generally a power of appointment, by the exercise of which he may vest the fee in the mortgagee by a single deed.

—Mortgages of leaseholds.

In preparing mortgages of *leaseholds*, since the late decisions establishing the liability of a mortgagee, claiming by assignment, to the rent and lessee's covenants that run with the land, though he do not take possession, (*vide ante*, Vol. 2, p. 52, *et seq.*), it has become usual to make them

GENERAL INTRODUCTORY OBSERVATIONS ON MORTGAGE SECURITIES.

by way of under-lease, instead of assignment, a reversion of a few days being left in the mortgagor; and this is certainly a very prudent precaution in some cases, but is rather too indiscriminately adopted. Where there is a trust for sale, the plan is objectionable; because, notwithstanding the doctrine in question, an under-lease confers a less marketable interest than an assignment, since, as there is no privity between the original lessor and the mortgagee, as under-lessee, the latter has no remedy under the covenants of the lessor, which, in cases where there are beneficial covenants on the part of the lessor, as a covenant for renewal or the like, is an important consideration. In such cases, therefore, an assignment is obviously the preferable assurance. Besides, it sometimes happens, that the mortgagor, by retaining the reversion in question, is enabled, as the owner of the term, to do acts amounting to a forfeiture, without the possibility of control on the part of the mortgagee, as by making an assignment, where the lease contains a clause restrictive of assignment, but not extending to under-letting. This, however, is not a very common case, and in regard to other acts of forfeiture, as they usually are of a nature which enables the person in possession to perform them, as to repair, &c., the mortgagee, by having the control over the possession, can insure their performance. The liability contracted by a mortgagee to the rent and covenants in the lease, by becoming assignee, is sometimes regarded with an exaggerated degree of apprehension; for, unless the property yields more than sufficient to pay the rent and perform the lessee's covenants, the security is of no value; and if there be a surplus value, the mortgagee will necessarily see that the covenants are performed during his ownership, to avoid forfeiture, (assuming forfeiture to be, as it usually is, a consequence of non-performance); and it is during his ownership only that his responsibility, as assignee, continues, being determinable at any time by assignment. If the lease, therefore, be unquestionably beneficial, the mortgagee has little to fear from the effect of the assignment; but, in proportion as the rent and covenants approach to the actual value of the property, the danger becomes greater, and caution is the more necessary. (*Vide* a suggestion, *post*, p. 320).

—of copyholds.

In preparing mortgages of *copyholds*, it is usual either for the mortgagor to enter into a covenant with the mortgagee to surrender them, which is followed by an actual conditional surrender, or simply to make the mortgagor surrender the copyhold lands to the mortgagee, and simultaneously enter into a deed of covenant for the payment of the money, and for title, further assurance, &c.; and the latter seems to be the more eligible plan, as it leaves nothing to be done to render the mortgagee's title complete, except admission, which is his own act. The accompanying deed also frequently contains a power of sale. Precedents adapted to both these modes will be found in the sequel.

As to trusts and powers of sale.

The modes of framing trusts and powers of sale, as introduced into se-

GENERAL INTRODUCTORY OBSERVATIONS ON MORTGAGE SECURITIES.

curities for money, are various. Some gentlemen make the instrument a conveyance simply, upon trust to reconvey on payment on the prescribed day, and to sell in default. Such a deed, however, is not properly a mortgage: it is a conveyance in trust for sale, subject to a trust to reconvey. It is true, that the property may be redeemed in equity at any time before a sale, and so far it has the characteristic of a mortgage; but it seems to be the general opinion, that the creditor has no right of foreclosure under such an instrument, though, upon principle, it should seem there is ground to contend that the debtor's right to redeem, and the creditor's right to foreclose, are correlative; and, that where equity recognises a right of redemption in the debtor, it should allow a right of foreclosure to the creditor. Doubts too may arise, how far some of the doctrines applicable to mortgages, in regard to tacking, &c., apply to the instruments under consideration, and for these reasons they appear not to present the most eligible form of security. The other, and rather more usual form of framing securities containing powers of sale, is to make the deed a common mortgage, (*i. e.* a conveyance with a proviso for redemption), and then to give a power of sale, in the event of non-payment, either with or without notice; but it is always proper, in such cases, to provide that purchasers shall not be obliged to inquire into the propriety of the sale, and that the power of sale shall not prejudice the mortgagee's right to foreclose. *(Vide Forms, post).*

It was formerly uncommon to introduce powers of sale into mortgages except under special circumstances, as where the security was precarious, or the mortgagor indigent; and the power when given, was usually vested in a trustee. The great delay and expense, however, attending the proceedings for obtaining a foreclosure of the equity of redemption have induced a very general adoption of powers of sale, and few persons will now lend money on mortgage without them. It has also become usual to vest the power in the mortgagee himself, instead of a trustee, the former mode being found more convenient; and this is not often objected to by a mortgagor, unless the intended mortgagee is a person in whose honour and integrity he can place no reliance, and with such a person it is not prudent that he should have any dealing. Indeed, since the securities in question have assumed their present shape, it is not only necessary for a mortgagee to take care that he lends his money to a solvent and honourable man, but it is equally incumbent on a mortgagor, to satisfy himself that he intrusts the power over his estate to a person who will not exercise it in a manner oppressive and detrimental to him, by proceeding to a sale under disadvantageous circumstances, and without exerting himself to obtain as large a price as possible, beyond what shall afford the means of paying his (the mortgagee's) own debt. This precaution becomes the more important, in proportion as the value of the estate exceeds the amount of the money advanced upon it. In general, it seems to be proper to make notice to the mortgagor a preliminary to the sale, guarding a purchaser in the usual

GENERAL INTRODUCTORY OBSERVATIONS ON MORTGAGE SECURITIES.

manner against the consequence of this requisition not having been complied with. (*Vide post*). If, however, a mortgagee omitted to give notice, as required by the power, (especially if he then sold at an undervalue), there can be no doubt that he would be liable to damages at law upon his covenant, (for a covenant not to sell, except in the prescribed manner, is generally inserted), and be chargeable in equity for a breach of trust. With these precautions on the part of the mortgagor, the objection which is sometimes urged against powers of sale, as placing the estate too much at the mercy of the mortgagee, is considerably obviated, and the general use of them may be regarded as an improvement, operating as much to the advantage of borrowers as of lenders; for, by facilitating the means of obtaining payment, they have rendered mortgages a more eligible mode of investing money; and mortgagees, in estimating the adequacy of a security, are not now obliged to calculate the costs of a suit of foreclosure, as part of the expenses against which an indemnity is to be provided out of the estate.

As to bonds accompanying mortgages.

Bonds for the payment of monies secured by mortgage are sometimes given in addition to the covenant to pay, which is invariably inserted in the deed; but they add nothing to the security derived from the covenant, inasmuch as it has long been settled, that actions of debt may be brought on such covenants, (being covenants to pay sums certain; see *Browne* v. *Pendlebury*, Cro. El. 268, pl. 4; *Ingleden* v. *Cripp*, 2 Lord Raym. 14; see also *Wade* v. *Branch*, 2 And. 53, pl. 39; Co. Litt. 47. b.; 7 Vin. Ab. 334, tit. "*Debt*" (G. 1.);) which are, therefore, binding on the devisees of the covenantor, (*vide ante*, Vol. 2, p. 360); besides which, actions of covenant may now be sustained against devisees, (*vide* stat. 1 Wm. 4, c. 47, stated *post*, Vol. 6, p. 351). The bond is, for this reason, always an unnecessary expense.

Warrants of attorney to confess judgment.

Warrants of attorney (*a*) sometimes, though not very frequently, accompany mortgages as a collateral security; and they certainly expedite the means of obtaining satisfaction out of the personal property of the mortgagor, and, if judgment be entered up and duly docketted, constitute a general lien upon his real estate; but if the mortgagor be a trader, the warrant of attorney should not now be relied on as a means of summarily enforcing payment, when the mortgagor shall be suspected to be in insolvent circumstances; for it seems, by the late decisions upon the construction of the clause in the late bankrupt act, relating to this species of security, (6 Geo. 4, c. 16, s. 108), that, *unless the debt is satisfied by the levying of the execution and sale before the bankruptcy*, the judgment is void against the

Effect of bankruptcy upon warrants of attorney.

(*a*) These observations, it will be seen, relate to warrants of attorney to confess judgment in actions of *debt*, and not in ejectment. The latter are sometimes found very useful.

GENERAL INTRODUCTORY OBSERVATIONS ON MORTGAGE SECURITIES.

creditors. *Wymer* v. *Kemble*, 6 Barn. & Cress. 479; *S. C.* 9 Dowl. & Ryl. 511. See also *Taylor* v. *Taylor*, 5 Barn. & Cress. 392; *S. C.* 8 Dowl. & Ryl. 159.

These cases are very important, as fixing the construction of the very obscure clause in question, which provides, "that no creditor, having security for his debt, or having made any attachment in London or any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of any execution or extent, served and levied by seizure upon, or any mortgage of or lien upon any part of the property of such bankrupt before the bankruptcy. *Provided, that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or* nil dicit, *shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateable with such creditors.*"

Case of *Wymer* v. *Kemble*.

In *Wymer* v. *Kemble*, A. (the bankrupt) executed a warrant of attorney to B. (the plaintiff), on the 24th of February, 1819, and B. entered up judgment and took out execution on the 10th of November, 1825, on which day the sheriff levied on A.'s goods, and having caused them to be duly appraised, he (the sheriff) by a bill of sale bearing date the 5th of December, 1825, in consideration of 402*l.* 17*s.* bargained and sold the goods to the plaintiff, and on the same day delivered the goods to the plaintiff, who subsequently carried on business on the premises in his own name. On the 23rd of December, A. declared himself insolvent; on the 30th, a commission issued against him; and on the 31st the messenger seized the goods in question. The Court held, that B. was entitled to recover them in trover against the assignees, on the ground, that "the *seizure and sale were perfect and complete before the act of bankruptcy.*" Lord *Tenterden* observed, "that the proviso in the act only limited the exception, and the exception applied only to cases falling within the first part of the section, namely, those of creditors *having security;* and that A., at the time of the bankruptcy, *not being a creditor at all*, could not be within the operation of the statute." And the circumstance that the act of bankruptcy has taken place before the return-day of the *fi. fa.* is immaterial, if it be after the sale. *Higgins* v. *M'Adam*, 3 Younge & Jervis, 1. But if the act of bankruptcy precede the sale, though it be committed while the sheriff is in possession, he is bound, having notice of the bankruptcy, to pay over the proceeds to the assignees. *Notley* v. *Buck*, 8 Barn. & Cress. 160; *S. C.* 2 Mann. & Ryl. 68. The effect of these decisions is to render warrants of attorney to confess judgment of very little value as a means of taking the goods of traders, as it is in the power of a debtor to defeat any execution taken out upon such a judgment, by committing an act of bankruptcy after the seizure. As to the effect of the bankruptcy of a judgment debtor upon the operation of the judgment, as a lien on real estate in the hands of third persons, *vide post*, p. 487.

MORTGAGE *by* DEMISE *of a* MESSUAGE *with* COMMON CLAUSES, *including a* COVENANT *to* INSURE *against* FIRE,—*produce Receipts for Premiums, &c.*

MORTGAGE BY DEMISE, WITH USUAL CLAUSES.

THIS INDENTURE, made the —— day of ——, 18—, Parties.
BETWEEN [*mortgagor*], of &c., of the one part; and [*mortgagee*], of &c., of the other part. [WHEREAS the said Recital, that mortgagor is seised.
[*mortgagor*] is seised to him and his heirs of the messuage or dwelling-house and hereditaments hereinafter described, and hereby intended to be demised, for an estate of inheritance in fee-simple in possession: AND WHEREAS Agreement for loan.
the said [*mortgagee*] hath, at the request of the said [*mortgagor*], agreed to lend and advance him the sum of £——, at interest, upon security of the said hereditaments, in manner hereinafter contained. NOW THIS *Testatum.*
INDENTURE] WITNESSETH, that [in pursuance of the said agreement (*a*),] in consideration of the sum of In consideration of the money advanced.
£——, of lawful money of the United Kingdom, in hand paid by the said [*mortgagee*] to the said [*mortgagor*], at or immediately before the execution of these presents, the receipt whereof the said [*mortgagor*] doth hereby acknowledge; and from the same, and every part thereof, doth release and discharge the said [*mortgagee*], his executors, administrators and assigns; the said [*mortgagor*] The mortgagor demises to the mortgagee.
Hath granted, bargained, sold, and demised, and by these presents *Doth* grant, bargain, sell, and demise, unto the said [*mortgagee*], his executors, administrators, and assigns, *(describe messuage);* Together with all out- General words.
houses, buildings, walls, ways, passages, waters, water-

(*a*) These recitals are unnecessary, as the mortgagor's covenants for title state that he is seised in fee, and the proviso for redemption explains the nature and object of the conveyance.

MORTGAGE BY DEMISE, WITH USUAL CLAUSES.

courses, profits, privileges, easements, advantages, rights, members, and appurtenances whatsoever, to the said messuage or dwelling-house and premises, or any part or parts thereof, belonging, or in anywise appertaining, or now or at any time heretofore held, occupied, or enjoyed therewith: *And* the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of the said premises; *And also* all deeds, papers, and writings relating to, or in anywise concerning, the title of the said [*mortgagor*] to the said premises, or any part thereof, now in his custody, or which he can procure without suit at law or in equity. To HAVE AND TO HOLD the said messuage or dwelling-house hereinbefore described, and all and singular other the premises hereby demised, or intended so to be, with their and every of their appurtenances, unto the said [*mortgagee*], his executors, administrators, and assigns, henceforth, for the full term of one thousand years, to be computed from the day of the date of these presents, and fully to be complete and ended, without impeachment of or for any manner of waste; *subject nevertheless* to the proviso or condition for redemption hereinafter contained, (that is to say): PROVIDED ALWAYS, and these presents are upon this express condition, that if the said [*mortgagor*], his heirs, executors, or administrators, shall duly pay, or cause to be paid, unto the said [*mortgagee*], his executors, administrators, or assigns, at or in the common dining-hall of the Middle Temple, in the city of London, the sum of £——, of lawful money of the United Kingdom, *with interest for the same, after the rate of 5l. per cent. per annum, from the day of the date of these presents, on the —— day of —— now next ensuing, without any deduction or abatement whatsoever* (*b*),

Title deeds.

Habendum.

Proviso for redemption.

(*b*) This proviso is adapted to the ordinary case of a sum of money lent, to be repaid with interest in six months; in which case the principal and interest are both payable at the same time. Where, however, it is agreed that the principal shall remain a longer time upon the security, the following words should be substituted for the clause in italics in the text:—

Variation, where

"On the —— day of ——, which will be in the year 18—,

MORTGAGE BY DEMISE, WITH USUAL CLAUSES.

on account of any taxes, or otherwise, then the said term of one thousand years hereby created, and every clause, matter, and thing herein contained, shall cease and be void, to all intents and purposes whatsoever (*c*). AND the said [*mortgagor*], for himself, his heirs, executors, administrators and assigns, doth hereby covenant and agree with the said [*mortgagee*], his executors, administrators, and assigns, that the said [*mortgagor*], his heirs, executors, administrators, or assigns, will duly pay, or cause to be paid, unto the said [*mortgagee*], his executors, administrators or assigns, the said sum of £——, with interest for the same, after the rate aforesaid, at the time and in manner hereinbefore appointed for the payment thereof respectively, and according to the true intent and

Mortgagor's covenants.

To pay principal and interest monies.

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and in the meantime interest for the same, after the rate of *5l. per cent. per annum*, such interest to be paid in equal portions half-yearly, on the —— day of ——, and the —— day of ——, in every year; and the first half-yearly payment thereof to be made on the —— day of —— now next ensuing, without making any deduction out of the same sum and interest respectively," &c.

the principal is payable at a future period, and interest in the meantime half yearly.

Where it is stipulated, that the money shall remain a given time upon the security, it is better to frame the proviso accordingly, (as in the clause just given), than to make the principal and interest payable under the proviso at the end of six months, superadding a covenant by the mortgagee, not to call it in until the prescribed period, which makes one part of the instrument contradict the other.

(*c*) If the money is paid or tendered on the day the estate ceases, and no assignment or surrender by the mortgagee is necessary; in such a case the mortgagee should sign a full receipt for the money, acknowledging the payment on the day; and this should be attested by some person who was witness to the payment. It rarely happens, however, in mortgage transactions, that the money is paid on the day or days provided in the clause for redemption; nor is such a payment (where the principal and interest are payable together at the end of six months), often in the contemplation of the parties, at the time of the making of the mortgage. But where it is intended that the loan shall remain a specific time, this should invariably be made part of the stipulations of the deed.

Effect of payment on the day appointed by the proviso for redemption.

MORTGAGE BY DEMISE, WITH USUAL CLAUSES.

meaning of these presents; *And also*, that the said [*mortgagor*] is now seised to him and his heirs of the said messuage or dwelling-house, hereditaments, and premises hereby demised, or intended so to be, for a clear, rightful, absolute, and indefeasible estate of inheritance, in fee-simple in possession; *And also*, that the said [*mortgagor*] now hath in himself good right and absolute authority by these presents to grant and demise the said messuage or dwelling-house, hereditaments, and premises, and every part thereof, unto the said [*mortgagee*], his executors, administrators, and assigns, for the said term of one thousand years, in manner aforesaid, and according to the true intent and meaning of these presents; *And also*, that in case default shall be made in payment of the said sum of £——, or the interest thereof, or any part of the same respectively, at the time and in manner aforesaid, contrary to the true intent and meaning of these presents, it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, thenceforth during all the residue which shall be then unexpired of the said term of one thousand years hereby granted, to enter into and hold and enjoy the said messuage or dwelling-house, hereditaments, and premises, hereby demised, or intended so to be, and every part of the same, and to take the rents and profits thereof, without any interruption or denial whatsoever, from or by the said [*mortgagor*], or any other person or persons whomsoever; *And that* free and clear, or freely, clearly, and absolutely exonerated and discharged, or by the said [*mortgagor*], his heirs, executors, or administrators, effectually indemnified from and against all former or other estates, rights, titles, charges, and incumbrances whatsoever; *And further*, that the said [*mortgagor*], and his heirs, and every person whosoever, having, or lawfully or rightfully claiming any estate, right, title or interest at law or in equity, or to or out of the said messuage or dwelling-house, hereditaments, and premises hereby demised, or intended so to be, or any part thereof, will, at any time, or from time to time hereafter, upon every reasonable request of the said [*mortgagee*], his executors, administrators, or assigns, but at the costs and charges of the said [*mortgagor*], his heirs, executors,

That he is seised in fee.

That he has power to demise.

For quiet enjoyment after default.

Free from incumbrances.

For further assurance.

MORTGAGE BY DEMISE, WITH USUAL CLAUSES.

administrators, or assigns, make, do, acknowledge, levy, suffer, execute, and perfect every such lawful and reasonable act, deed, conveyance, or assurance in the law whatsoever, either by fine, common recovery, release, confirmation, or otherwise, for more effectually or satisfactorily granting, demising, or otherwise assuring the said hereditaments and premises unto the said [*mortgagee*], his executors, administrators, and assigns, during the residue which shall be then unexpired of the said term of one thousand years hereby granted, or intended so to be (*d*), as by the said [*mortgagee*], his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably advised and required: *And lastly*, that the said [*mortgagor*], his heirs, executors, or administrators, will, at his or their own costs and charges, from time to time, so long as any sum or sums of money shall remain owing to the said [*mortgagee*], his executors, administrators, or assigns, by virtue of these presents, insure and keep insured from loss or damage by fire, in the name of the said *mortgagee*, his executors, administrators, or assigns in the —— fire-office, or in some other public insurance office to be nominated in writing by the said [*mortgagee*], his executors, administrators, or assigns, the said messuage or dwelling-house and buildings hereby demised, or intended so to be, and all other erections and buildings to be erected and built on the land or ground hereby demised, or intended so to be, in the full sum of £——, at the least; and will, from time to time, immediately after payment of the premiums to become payable

To insure the messuage and buildings against fire.

(*d*) Sometimes is added:—

"And also, after default shall have been made in payment of the said principal sum of £——, and interest, or any part thereof respectively, at the times and in the manner hereinbefore appointed for payment of the same, for granting, releasing, conveying, and assuring the fee-simple and inheritance of the said hereditaments and premises, expectant upon or subject to the said term of one thousand years, unto and to the use of the said [*mortgagee*], his heirs and assigns."

Covenant for the assurance of the fee after default.

MORTGAGE BY DEMISE, WITH USUAL CLAUSES.

in respect of such insurance, deliver to the said [*mortgagee*], his executors, administrators, or assigns, the receipts for such premiums; And that in case default shall be made by the said [*mortgagor*], his executors, administrators, or assigns, in insuring or keeping insured the said messuage, or dwelling-house and buildings, or any of them, or in delivering the receipts for the premiums of insurance as aforesaid, then and in every such case it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, from time to time, so long as any sum or sums of money shall remain due as aforesaid, to effect and keep on foot such insurance as aforesaid; and that the said [*mortgagor*], his heirs, executors, administrators, or assigns, will, at the expiration of twenty-one days from the time of such payment, or sooner, on demand thereof, pay unto the said [*mortgagee*], his executors, administrators, or assigns, such sum or sums of money as the said [*mortgagee*], his executors, administrators, or assigns, shall pay or expend in or about such insurance, with interest for the same at the rate of *5l. per cent. per annum;* and such sum and sums, and interest, shall be a charge upon the said messuage or dwelling-house, hereditaments, and premises hereby demised, or intended so to be, in the same manner as the said principal and interest monies hereinbefore mentioned to be secured; *And* it is hereby declared, that the said [*mortgagee*], his executors, administrators, or assigns, shall hold the policy or policies of insurance to be effected as aforesaid, in trust, in the first place, for better securing the said sum of £——, and the interest thereof, and the said monies which shall have been paid or expended by him and them in and about such insurance or insurances, and interest thereon as aforesaid, and, subject thereto, in trust for the said [*mortgagor*], his heirs and assigns (*e*): PROVIDED ALSO, and it is hereby

Proviso, that mortgagor shall enjoy until default.

(*e*) Sometimes the covenant to insure goes on to provide for the application of the money in case of fire:—

Variation, where the application of the insurance money is provided for.

"And that in case any loss or damage by fire shall happen to the said messuage or dwelling-house, buildings, and premises hereby demised, the money or monies which shall

further declared and agreed by and between the said [*mortgagor*] and [*mortgagee*], that, until default shall be

be received by the said [*mortgagee*], his executors, administrators, or assigns, by virtue of the said insurance, shall forthwith be applied and laid out by him and them in rebuilding the same, or in repairing the damage or injury which shall have been sustained; [but, in case the principal sum and interest hereby intended to be secured, or any part thereof, shall then have become due and payable, it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, to apply a sufficient part of such monies so to be received by him or them, in payment of the said principal and interest, or any part thereof, and pay the surplus unto the said [*mortgagor*], his heirs or assigns, or, in the discretion of the said [*mortgagee*], his executors, administrators, or assigns (in case any of the monies hereby intended to be secured shall remain unpaid), in rebuilding or repairing the said premises as aforesaid; PROVIDED nevertheless, and it is hereby declared, that, unless the said [*mortgagee*], his executors, administrators, or assigns, shall, within —— days after such loss or damage by fire shall have happened, give notice in writing to the said [*mortgagor*], his heirs or assigns, of his or their intention to apply the said insurance money in or towards the liquidation of his or their said mortgage debt (in case the same shall be then due), he or they shall be bound to apply the same in the rebuilding or repairing of the said premises, as aforesaid]."

It is unnecessary, however, thus explicitly to provide for the application of the money. The clause in the text is sufficiently declaratory of the rights of the parties; and, indeed, without any such clause, those rights are obvious. The addition within brackets, it will be observed, gives the mortgagee the right of applying the money in immediate payment of his principal and interest, if then due. This, however, is not a usual, nor, perhaps, a very fair stipulation, as it would impose upon the mortgagor the necessity of raising the money to rebuild, under great disadvantages, and occasion him much injury from the delay. Though, therefore, it has been thought proper to give a form adapted to such a case, its adoption cannot be recommended. It should be observed, that the

MORTGAGE BY DEMISE, WITH USUAL CLAUSES.

made in payment of the said sum of £——, or the interest thereof, or any part of the same respectively, contrary to the proviso hereinbefore contained, it shall be lawful for the said [*mortgagor*], his heirs or assigns, to hold and enjoy, and to take the rents and profits of the said messuage or dwelling-house, hereditaments, and premises hereby demised, or intended so to be, without any hindrance, interruption, or denial whatsoever, of or by the said [*mortgagee*], his executors, administrators, or assigns, or any person or persons claiming under him or them, any thing herein contained to the contrary notwithstanding. IN WITNESS, &c.

Provision in the Stamp Act in regard to insurance monies.

Stamp Act expressly exempts monies advanced for insurance against fire from the operation of the *ad valorem* duty on mortgages; and applies a similar exemption to monies advanced for life insurance under agreements in grants of annuity. In the converse cases, however, that is, where the fire insurance is to secure an annuity, and the life insurance, a sum secured by mortgage, the exemption does not apply; and in such cases, therefore, some limit should be affixed to the amount of the monies advanced for these purposes, in order to avoid the duty of 25*l.* which attaches to securities for indefinite sums of money.

IN FEE BY LEASE AND RELEASE.

MORTGAGE IN FEE *by* LEASE *and* RELEASE, *with* USUAL CLAUSES, *including a* POWER *to the* MORTGAGEE *to* MAKE LEASES. (VARIATION *where Mortgage is made to secure a* DEBT ALREADY DUE *and* FUTURE ADVANCES. *Also where a* POWER *of* LEASING *is given to the* MORTGAGOR).

Parties.

THIS INDENTURE, made &c.; BETWEEN [*mortgagor*], of &c., of the one part; and [*mortgagee*], of &c., of the other part.

Recital of mortgagor's title.

[(*a*) WHEREAS the said [*mortgagor*] is

(*a*) The parts of this precedent within brackets may very properly be omitted for the sake of conciseness.

IN FEE BY LEASE AND RELEASE.

seised of, or well and sufficiently entitled to the inheritance in fee-simple of and in the messuage or tenement, closes of land, and hereditaments hereinafter described and hereby intended to be released (*b*). AND WHEREAS the said [*mortgagor*], having occasion to borrow the sum of £——, hath requested the said [*mortgagee*] to lend him the same, which he the said [*mortgagee*] hath consented and agreed to do, on having the re-payment thereof, with interest, secured to him in manner hereinafter expressed (*c*). NOW THIS INDENTURE] WITNESSETH, *Testatum.*

(*b*) Sometimes it is convenient to describe the manner in which the mortgagor has become entitled to the property. This should be done where the title does not appear by the anterior deeds, and it is frequently useful to add such circumstances of dates, &c., as will facilitate the proof of the title on any future occasion. Thus:—

Suggested mode of reciting descent of lands to mortgagor, &c.

"*(After reciting the conveyance to the mortgagor's father)*, AND WHEREAS the said [*father*] departed this life on or about the —— day of ——, intestate, leaving the said [*mortgagor*] his eldest son and heir at law, the said [*mortgagor*] being the only child of the said [*father*], by [*father's first wife*], his first wife, deceased, formerly ——, spinster, with whom the said [*father*] intermarried on or about the —— day of ——, 1780, the said marriage having been solemnized at the parish church of ——; *And whereas* the said [*mortgagor*] (being the only issue of such marriage as aforesaid) was baptized at the parish church of ——, on the —— day of ——; AND WHEREAS, upon the decease of the said [*father*], the father of the said [*mortgagor*] as aforesaid, the freehold and inheritance of the said messuage or tenement, closes of land, and hereditaments, so conveyed and assured to him the said [*father*] as aforesaid, descended and came to the said [*mortgagor*], and he is now seised of, or well and sufficiently entitled to the same;" *(then proceed with recitals, ut supra).*

(*c*) If the mortgage is made to secure a debt already incurred, and future advances, the recital should be as follows:—

Recital where mortgage is to

"AND WHEREAS the said [*mortgagor*] is now indebted unto the said [*mortgagee*] in the sum of £——, and it

IN FEE BY LEASE AND RELEASE.

that [in pursuance of the said agreement, and] in consideration of the sum of £—— of lawful money of the United Kingdom, to the said [*mortgagor*] in hand paid by the said [*mortgagee*], at or immediately before the execution of these presents, the receipt of which said sum he the said [*mortgagor*] doth hereby acknowledge, and from the same, and every part thereof, doth acquit, release, and discharge the said [*mortgagee*], his heirs, executors, administrators, and assigns; *He* the said [*mortgagor*] *Hath* granted, bargained, sold, and released, and by these presents *Doth* grant, &c. unto the said [*mortgagee*], and his heirs, (in the actual possession of the said [*mortgagee*] now being by virtue of a bargain and sale to him thereof made by the said [*mortgagor*], in consideration of 5*s.* to him paid by the said [*mortgagee*], by indenture bearing date the day next before the day of the date of these presents, for one whole year, to commence from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession); ALL THAT *(describe parcels)* together with all [houses, outhouses, edifices, buildings, barns, stables, yards, gardens, orchards, ways, paths, passages, waters, water-courses, trees, woods, underwoods, commons, commonable rights, hedges, ditches, fences, mounds, liberties, privileges, profits, commodites, advantages, and] appurtenances whatsoever, to the said messuage or tenement, closes of land and premises [hereby released, or otherwise assured or intended so to be, or to any of them, or any part thereof respectively] belonging, [or in anywise appertaining, or with the same or any part thereof now or at any time heretofore usually held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof, or of any of

Consideration.

Grant.

General words.

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extend to future advances.

has been agreed, that, for securing as well the said debt as also such further sum or sums as may hereafter be advanced by the said [*mortgagee*] to or on the account of the said [*mortgagor*], as hereinafter mentioned (subject to the limitation hereinafter contained), and interest thereon respectively, the said [*mortgagor*] shall execute to the said [*mortgagee*] the mortgage security hereinafter contained."

IN FEE BY LEASE AND RELEASE.

them respectively]; [*And* the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of the said messuage or tenement, closes of land, and hereditaments, hereby released, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their appurtenances]; AND ALL the estate, right, title, interest, use, trust, inheritance, property, possession, benefit, and equity of redemption, claim and demand whatsoever, both at law and in equity, or otherwise howsoever, of him the said [*mortgagor*] of, in, to, out of, or upon the said messuage or tenement, closes of land and hereditaments [hereby released, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their appurtenances]; *And* all deeds, evidences, and writings relating to the title of the said [*mortgagor*] to the said hereditaments and premises hereby released or otherwise assured, or intended so to be, now in the custody of the said [*mortgagor*], or which he can procure without suit at law or in equity; TO HAVE AND TO HOLD the said messuage or tenement, closes of land, hereditaments, and all and singular other the premises hereby released or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their appurtenances, unto the said [*mortgagee*], his heirs and assigns, TO THE ONLY PROPER USE and behoof of the said [*mortgagee*], his heirs and assigns, for ever; subject nevertheless to the proviso or condition for redemption hereinafter contained, that is to say; PROVIDED ALWAYS, and these presents are upon this express condition, that, if the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall pay or cause to be paid unto the said [*mortgagee*], his executors, administrators, or assigns, at his dwelling-house, situate at ——— aforesaid, the said sum of £——, of lawful money of the United Kingdom, with interest for the same after the rate of 5*l.* for every 100*l.*, by the year, upon the —— day of ——— now next ensuing (*d*),

Habendum.

To the use of the mortgagee in fee.

Proviso for redemption.

(*d*) If the mortgage is to secure a debt already due and future advances, add—

"And shall also, when thereunto required by the said

Variation, where

IN FEE BY LEASE AND RELEASE.

without any deduction or abatement whatsoever, then these presents, and every article, clause, matter, and thing herein contained, shall cease, determine, and be void, to all intents and purposes whatsoever, any thing hereinbefore contained to the contrary thereof notwithstanding. AND the said [*mortgagor*] doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the said [*mortgagee*], his heirs, executors, administrators, and assigns, that he the said [*mortgagor*], his heirs, executors, or administrators, shall and will duly pay or cause to be paid unto the said [*mortgagee*], his executors, administrators, or assigns, the said principal sum of £——, and the interest thereof, after the rate aforesaid, at the time or times, and in the manner hereinbefore appointed for payment of the same (*e*), according to the true intent

Covenants by mortgagor—

To pay principal and interest.

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mortgage extends to future advances.

[*mortgagee*], his executors, administrators, or assigns, or, without such requisition, within the space of six calendar months after the sum or sums of money hereinafter mentioned shall be paid or advanced by him or them, pay or cause to be paid unto the said [*mortgagee*], his executors, administrators, or assigns, all such other sum or sums of money as shall at any time or times hereafter become due or owing from the said [*mortgagor*] to the said [*mortgagee*], by reason of any future payments or advances to be made by the said [*mortgagee*], unto or for the use of the said [*mortgagor*], or otherwise howsoever, not exceeding, in the whole, together with the said sum of £——, now due and owing as aforesaid, the sum of £——, [*add, if there is a covenant to insure, ut ante*, p. 241, "exclusive of any sum or sums of money to be paid or advanced for the insurance of the said messuage and buildings from loss or damage by fire, as hereinafter mentioned,"] with interest after the rate aforesaid on all such further sum or sums of money from the time or respective times of paying or advancing the same, and shall make the several payments aforesaid," &c.

Render.

(*e*) If the mortgage is to extend to future advances, add—

Variation, where mortgage is to

"And shall and will also, on being thereunto required by the said [*mortgagee*], his executors, administrators, or

IN FEE BY LEASE AND RELEASE.

and meaning of these presents; *And that* he the said [*mortgagor*] now hath in himself good right, full power, and lawful and absolute authority to grant, bargain, sell, release, and convey the said messuage or tenement, closes of land, and hereditaments hereby released, or otherwise assured, or intended so to be [and every part and parcel of the same, with their and every of their appurtenances], unto and to the use of the said [*mortgagee*], his heirs and assigns, in manner aforesaid, according to the true intent and meaning of these presents: *And also* that it shall be lawful for the said [*mortgagee*], his heirs or assigns, at any time or times after default shall have been made in payment of the said sum of £——, and interest, or any part thereof, contrary to the proviso or condition hereinbefore contained, peaceably and quietly to enter into and upon, have, hold, use, occupy, and enjoy the same messuage or tenement, closes of land, and hereditaments hereby released, or otherwise assured or intended so to be [and every part and parcel of the same, with their and every of their appurtenances], and to receive and take the rents and profits thereof, without any hindrance, eviction, interruption, or denial whatsoever, of, from, or by the said [*mortgagor*], his heirs, executors, administrators, or assigns, or any other person or persons whomsoever; And that free and clear [and freely, clearly, and absolutely acquitted, exonerated, released, and discharged, or otherwise by him the said [*mortgagor*], his

That he has right to convey.

For quiet enjoyment after default.

Free from incumbrances.

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assigns, or, without such requisition, within the space of six calendar months after the sum or sums of money hereinafter mentioned shall be paid or advanced by him or them, pay or cause to be paid unto the said [*mortgagee*], his executors, administrators, or assigns, all such further sum or sums of money as shall at any time or times hereafter become due or owing from the said [*mortgagor*] to the said [*mortgagee*] as aforesaid (not exceeding, with the said sum of £——, the amount aforesaid), with interest for the same after the rate, and from the time or times, and in manner aforesaid."

extend to future advances.

IN FEE BY LEASE AND RELEASE.

heirs, executors, or administrators, at his and their own costs and charges, sufficiently indemnified] from [and against] all [and all manner of former and other gifts, grants, feoffments, leases, mortgages, bargains, sales, jointures, dowers, right and title of dower, uses, trusts, wills, intails, annuities, legacies, rent-charges, rent-seck, rent-services, fines, amerciaments, statutes, recognizances, judgments, executions, extents, suits, decrees, debts of record, debts to the King's Majesty or any of his predecessors, sequestrations, estates, titles, troubles, liens], charges and incumbrances whatsoever; *Except* a certain indenture of lease, bearing date the —— day of ——, granted by the said [*mortgagor*] to [*lessee*], of ———, farmer, for the term of seven years from the —— day of —— preceding the date thereof, at the yearly rent of 100*l.*, payable quarterly, on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December in every year (*f*): *And moreover*, that the said [*mortgagor*], and his heirs, and every other person whosoever, lawfully or equitably and rightfully claiming or to claim any estate, right, title, or interest, at law or in equity, of, in, to, out of, or upon the said messuage or tenement, closes of land, and hereditaments [hereby released, or otherwise assured, or intended so to be, or any part thereof] (except in respect of the estate or interest hereinbefore excepted), shall and will from time to time, and at all times hereafter, upon the request of the said [*mortgagee*], his heirs, executors, administrators, or assigns, but at the costs and charges of the said [*mortgagor*], his heirs, executors, or administrators, make, do, acknowledge, levy, suffer, execute, and perfect, or cause or procure to be made, done, acknowledged, levied, suffered, executed, and perfected, all such further and other lawful and reasonable acts, deeds, conveyances, and

Exception of lease.

And for further assurance.

Mortgagees should inquire into the interests of tenants.

(*f*) A mortgagee should always obtain particular and accurate information as to the terms upon which the tenants in possession of the premises hold the same, for his government in any proceedings he may hereafter find it necessary to take by distress, or giving notice to quit, or otherwise, for obtaining possession of the property. Any subsisting lease should be noticed in this manner, by way of exception in the covenant against incumbrances.

IN FEE BY LEASE AND RELEASE.

assurances in the law whatsoever, [either by fine or fines, with or without proclamations, common recovery or recoveries, deed or deeds inrolled or not inrolled, release, confirmation, or other assurance whatsoever], for the more effectually, absolutely, and satisfactorily [granting, releasing, confirming, or otherwise] assuring the messuage or tenement, closes of land and hereditaments, [hereby released or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their appurtenances], unto and to the use of the said [*mortgagee*], his heirs and assigns, in manner aforesaid, and according to the true intent and meaning of these presents; as by the said [*mortgagee*], his heirs, executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably advised and required; (*add covenant to insure, ut ante*, p. 241); PROVIDED ALWAYS, and it is hereby declared and agreed by and between the said parties hereto, that, in the mean time, and until default shall happen to be made in payment of the said sum of £——, and the interest thereof, or of any part of the same, contrary to the intent and meaning of the proviso or condition for redemption hereinbefore contained, it shall be lawful for the said [*mortgagor*], his heirs, or assigns, to hold, occupy, and enjoy, and to receive and take the rents and profits of the said messuage or tenement, closes of land and hereditaments [hereby released or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their appurtenances], without any eviction, interruption, hindrance or denial whatsoever, from or by the said [*mortgagee*], his heirs or assigns, or from or by any other person or persons whomsoever, lawfully or rightfully claiming or to claim any estate or interest by, from, through, under, or in trust for him or them, any thing hereinbefore contained to the contrary thereof notwithstanding. PROVIDED ALSO, and it is hereby further declared and agreed, that it shall be lawful for the said [*mortgagee*], his heirs or assigns, from time to time and at all times, after default shall have been made in payment of the said sum of £——, and interest, or any part thereof respectively, contrary to the proviso or condition for redemption hereinbefore contained, during so long as he the said [*mortgagee*], his

Proviso for quiet enjoyment by mortgagor, until default.

Power to mortgagee to lease when in possession.

IN FEE BY LEASE AND RELEASE.

heirs or assigns, shall be in the possession of, or the receipt of the rents and profits of the said messuage or tenement, closes of land, and hereditaments, hereby released, or intended so to be, *and while any sum or sums of money shall remain due upon this present security*, by any indenture or indentures to be by him or them executed in the presence of and attested by one or more witness or witnesses, to limit or appoint by way of demise or lease, all or any part or parts of the said hereditaments, to any person or persons for any term not exceeding twenty-one years in possession and not in reversion; so that there be reserved in every such lease the best or most improved yearly rent or rents, to be incident to the immediate reversion of the same hereditaments, that can be reasonably gotten for the same, without taking any fine, premium, or foregift for the making thereof; and so that there be contained in every such lease a proviso for re-entry on non-payment of the rent to be thereby reserved for the space of thirty days after the same shall become due, and so that the person or persons respectively to whom any such lease shall be made as aforesaid, shall execute a counterpart thereof, and covenant for the due payment of the rent thereby reserved, and the lessee or lessees, his, her, or their executors, administrators, or assigns, be not made dispunishable for waste: [Provided nevertheless (*g*), and it is hereby declared, that no lease to be granted by the said [*mortgagee*], his heirs or assigns, while he or they shall be in possession of the said hereditaments so leased as aforesaid, shall be impeached by reason that the monies hereby intended to be secured shall have been paid and satisfied at the time of granting the same, unless the person or persons to whom such lease or leases shall be made, had actual knowledge thereof; but whether the said lessee or lessees had any such actual knowledge as aforesaid or not, the said [*mortgagee*], his heirs, executors, administrators, or as-

Proviso that no lease shall be impeached on account of mortgage debt having been satisfied.

(*g*) If the words in italics are inserted, it seems to be proper to add this proviso, otherwise it would be necessary for the lessee to inquire into the state of the pecuniary transactions between the mortgagor and mortgagee, in order to ascertain the validity of his lease. If possession is to be only requisite to the validity of the lease, such a provision is not necessary, as this is a fact easily ascertained.

signs, granting the said lease or leases, under the circumstances aforesaid, shall be liable to an action for damages by virtue of his covenant hereinafter contained]. And the said [*mortgagee*], for himself, his heirs, executors, and administrators doth hereby covenant with the said [*mortgagor*], his heirs and assigns, that he the said [*mortgagee*], his heirs or assigns, will not grant any lease or leases of the said hereditaments and premises hereby released, or intended so to be, or any part thereof, after the monies hereby secured shall have been paid and satisfied, nor in any case, except upon the terms and in the manner authorized by the power in that behalf hereinbefore contained (*h*). In witness, &c.

IN FEE BY LEASE AND RELEASE.

Covenant by mortgagee not to demise except in conformity to the power.

(*h*) For the form of a lease by a mortgagee, see *ante*, p. 16.

Sometimes a power is given to the *mortgagor* to lease while in possession, and as he has an interest in the property sufficient to prevent the power from being improvidently exercised, there seems to be no great danger in a mortgagee's conceding such a power, framed in the guarded terms in which these clauses are usually expressed. An objection, however, which may fairly be urged to the plan, is, that, as by this means a lease may be granted by the mortgagor without the knowledge of the mortgagee, the remedies of the latter, by distress or ejectment, may be obstructed, from his want of information in regard to the nature of the tenant's holding. This objection, however, may be obviated by making it a condition of the lease, that the counterpart (commonly required to be executed by the lessee) shall be delivered to the mortgagee within a certain number of days after the granting of the lease. The form of the power will then be as follows:—

As to the propriety of giving a leasing power to a mortgagor.

"Provided also, and it is hereby further declared, that it shall be lawful for the said [*mortgagor*], from time to time and at all times hereafter, during so long as he shall be in the actual possession or in the receipt of the rents and profits of the said hereditaments and premises, whether before or after default shall have been made in payment of the monies hereby intended to be secured, or any part thereof, pursuant to the proviso or condition for redemption hereinbefore contained, by indenture or indentures to be sealed and delivered by him or them, in the presence of, and attested by, one witness or more, to limit or appoint by way of demise or lease, all or any part

Form of power of leasing to mortgagor.

IN FEE BY LEASE AND RELEASE.

of the said hereditaments and premises hereby released, or otherwise assured or intended so to be, to any person or persons, for any term or number of years not exceeding twenty-one years from the making of such lease, to take effect in possession and not in reversion or by way of future interest, so that in every such lease there shall be reserved the best and most improved yearly rent or rents, during the continuance of the term thereby granted, to be incident to the immediate reversion, without taking any fine, premium, or foregift, for the making of such lease; and so that in every such lease there shall be contained a proviso or condition of re-entry on non-payment of the rent thereby reserved for the space of twenty-one days after the time to be appointed for payment thereof, and so that the lessee or lessees, his, her, or their executors, administrators, or assigns, shall not be authorized to commit waste, or be exempted from punishment for the commission thereof; and so that such lessee or lessees shall execute a counterpart of the lease to be so granted to him, her, or them, and such counterpart be delivered to the said [*mortgagee*], his executors, administrators, or assigns, or left at his or their last or most usual place of abode, within seven days after the execution thereof as aforesaid."

Mode of limitation to be adopted where mortgage contains a power to mortgagor to lease.

It should be observed, that, where a power of leasing is given to a mortgagor, it is better to limit the estate, not in the ordinary way, to the mortgagee and his heirs, to the use of him (the mortgagee), his heirs and assigns for ever, but to a third person, as releasee to uses, to the use of the mortgagee, in order to remove the objection which has been sometimes urged (though, it is conceived, upon grounds which it is difficult to sustain), that, where a limitation is made "unto and to the use of J. S., with a power reserved thereupon, such power is void; because J. S. is in by the common law." See Sand. on Uses, Vol. 1, p. 157. (See the doctrine of this respectable writer on the point ably combated by Sir *E. B. Sugden*, Sugd. Pow. p. 121, *et seq.*) It is admitted on all hands, that, if a limitation be made to A. and his heirs, to the use of B. and his heirs, with a power to C., a third person, to appoint by way of lease, (which is precisely the case of a mortgage reserving a power to lease to the mortgagor), the use limited by the appointment takes effect out of A.'s seisin, and the limitations are to be read as if placed in the following order: "To A. and his heirs, to such uses as C. shall by demise appoint, and, in default of appointment, to the use of B. and his heirs."

MORTGAGE *in* FEE *by* APPOINTMENT, *with* USUAL CLAUSES, *and a* TRUST *for* SALE *in Default of Payment.* (*Variations in Notes where a* RELEASE *is added to the Appointment* (*a*), *and where the* PRINCIPAL *is* PAYABLE *at a future Day, with* INTEREST HALF YEARLY *in the mean Time*).

APPOINTMENT AND RELEASE IN FEE, WITH POWER OF SALE.

THIS INDENTURE, made the first day of September, in the year of our Lord 18—, BETWEEN [*mortgagor*], of &c., of the one part; and [*mortgagee*], of &c., of the other part (*b*). WHEREAS, by indentures of lease and release,

Parties.

Recital of con-

(*a*) The practice which has obtained of making an owner in fee, who has a general power of appointment over lands, release his interest as well as exercise the power, can, with the least shadow of plausibility, only be defended in cases where the requisition of the power in regard to the attestation &c. of the appointment is of such a particular kind as to render it probable that, in the execution of the deeds, the ceremonies required may not be complied with; but even then, inasmuch as it generally happens, that, from the circumstance of there being an attendant term (*vide ante*, Vol. 4, p. 224), or a subsisting tenancy for a term of years, or from year to year (see *Doe* d. *Were* v. *Cole*, 1 Man. & Ryl. 33; 7 Barn. & Cress. 243), the deed, though void as an appointment, might take effect as a grant of the reversion, the error is not often irremediable. At all events, now that powers of appointment in purchase deeds are generally (they ought to be universally) framed in such terms as that a deed executed in the ordinary manner cannot fail to be a valid execution of the power, the reason for the precaution (if it ever existed) has lost its force, and the addition of a lease and release must be regarded as an unnecessary appendage to the instrument. See some observations on the relative advantages of conveyances by appointment, and lease and release, *post*, Vol. 7, p. 450.

Remarks on convenances by appointment and release.

The part of the Precedent applicable to the release has been placed within brackets, in order to enable the person using the Precedent to adopt or reject it as he chooses.

(*b*) If a release is added, the parties will be—the mortgagor, of the first

APPOINTMENT AND RELEASE IN FEE, WITH POWER OF SALE.

and appointment, bearing date respectively on or about the —— and —— days of ——, 1812; the release and appointment being of three parts, and made between [*vendor*], of the first part; the said [*mortgagor*], of the second part; and [*mortgagor's trustee*], of the third part; all and singular the messuage, farm, lands, and hereditaments hereinafter described, and hereby appointed (*c*), or intended so to be, were, for the considerations therein mentioned, conveyed and assured *To such uses*, for such estate or estates, upon such trusts, and for such intents and purposes, as the said [*mortgagor*], by any deed or deeds, [to be executed by the said [*mortgagor*], in the presence of and attested by one witness or more], should direct or appoint; and, in default of such direction or appointment, *To the use* of the said [*mortgagor*] and his assigns, during the term of his natural life, without impeachment of waste; with a limitation *To the use* of the said [*trustee*], his executors and administrators, during the life of the said [*mortgagor*], *In trust* for him and his assigns; with remainder *To the use* of the said [*mortgagor*], his heirs and assigns for ever. AND WHEREAS the said [*mortgagor*], having occasion for the sum of £——, hath requested the said [*mortgagee*] to lend and advance him the same at interest, on security of the said hereditaments, which the said [*mortgagee*] hath consented and agreed to do. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said recited agreement, and in consideration of the sum of £——, of lawful money of the United Kingdom, paid by the said [*mortgagee*] to the said [*mortgagor*], at or before the execution of these presents, the receipt whereof the said [*mortgagor*] doth hereby confess and ac-

ceyance to mortgagor to uses to prevent dower.

Recital of agreement for loan.

Testatum.

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part; his trustee to prevent dower, of the second part; and the mortgagee, of the third part; for, though it is not usual in such cases to make the trustee a party, it is more correct to do so, as he is legal owner of a portion of the inheritance. The reasons, however, suggested in the preceding note for dispensing with the release altogether, are applicable to shew that it is immaterial whether the trustee joins or not.

(*c*) "and released."

knowledge, and from the same sum and every part thereof doth acquit, release, and for ever discharge the said [*mortgagee*], his heirs, executors, administrators, and assigns, the said [*mortgagor*], by virtue and in exercise and execution of the power or authority given or reserved to him by the said hereinbefore in part recited indenture of appointment and release, and of every other power and authority enabling him in this behalf, *Doth* [by this deed in writing, executed by the said [*mortgagor*], in the presence of the person or persons whose name or names is or are hereupon indorsed as an attesting witness or attesting witnesses of the execution thereof by him (*e*),] absolutely direct, limit, and appoint, that all (*here describe parcels*) (*f*), with their and every of their rights, members, and appurtenances, shall thenceforth remain, continue, and be TO THE ONLY PROPER USE of him the said [*mortgagee*], his heirs and assigns, for ever; Subject, nevertheless, to the proviso or agreement for the redemption of the said hereditaments hereinafter contained (*g*), (that is to say), PROVIDED

APPOINTMENT AND RELEASE IN FEE, WITH POWER OF SALE.

Appointment by mortgagor.

Proviso for redemption.

(*e*) If the power prescribes no particular mode of execution, the clause in brackets had better be omitted; if it does, the clause should be framed in conformity to it; but even then it is not essential, and is only useful as drawing attention to the circumstance to be attended to in the execution of the deed.

(*f*) If a release be added, the form will be—

"All and singular the messuage, farm, lands, and hereditaments hereinafter described and hereby released, or otherwise assured, or intended so to be."

Variation, where a release is added to the appointment.

(*g*) If a release is added, proceed as follows—

"AND THIS INDENTURE FURTHER WITNESSETH, that, for the consideration aforesaid, and also in consideration of the sum of 10*s.* paid by the said [*mortgagee*] to each of them the said [*trustee*] and [*mortgagor*], immediately before the execution of these presents, the receipt whereof respectively is hereby acknowledged, the said [*mortgagor*] *Hath* granted, bargained, sold, and released, and by these presents *Doth* grant, bargain, sell, and

Further *testatum*.

Mortgagor and trustee release to mortgagee.

APPOINTMENT AND RELEASE IN FEE, WITH POWER OF SALE.

ALWAYS, and it is hereby declared and agreed by and between the said parties to these presents, that if the said

release, and the said [*trustee*] by the direction of the said [*mortgagor*], testified by his executing these presents, *Hath* bargained, sold, and released, and by these presents *Doth* bargain, sell, and release unto the said [*mortgagee*], his heirs, and assigns, (in the actual possession of the said [*mortgagee*] now being by virtue of a bargain and sale made to him by the said [*mortgagor*] and [*trustee*], in consideration of 5*s.* a-piece, by indenture bearing date the day next before the day of the date of these presents, for one year to be computed from the day next before the day of the date of the said indenture of bargain and sale, and by force of the statute made for transferring uses into possession), *(describe parcels)*, Together with all outhouses, edifices, buildings, ways, waters, water-courses, trees, woods, underwoods, hedges, ditches, fences, commons, rights, profits, privileges, easements, advantages, rights, members, and appurtenances whatsoever, to the said messuage, farm, lands, and premises, or any part thereof respectively belonging or in anywise appertaining, or now or at any time heretofore usually held, occupied, or enjoyed therewith; *And also* all the estate, right, title, interest, benefit, claim, and demand whatsoever, both at law or in equity, of the said [*mortgagor*] and [*trustee*], and each of them, in or to or out of the said hereditaments and premises, and every part thereof; *And also* all deeds, papers, and writings relating to or in anywise concerning the title of the said hereditaments and premises, or any part thereof, either alone or together with any other hereditaments of less value, now in the custody or possession of the said [*mortgagor*], or which he can procure without suit at law or in equity; To HAVE AND TO HOLD the said messuage, farm, lands, and hereditaments hereinbefore described, and all and singular other the premises hereby appointed and released, or otherwise assured, or intended so to be, unto the said [*mortgagee*], his heirs, and assigns: To THE ONLY PROPER USE of the said [*mortgagee*], his heirs, and assigns, for ever; *subject nevertheless* to the proviso or agreement for re-

Reference to lease for a year.

General words.

All the estate.

All deeds.

Habendum.

APPOINTMENT AND RELEASE IN FEE, WITH POWER OF SALE.

[*mortgagor*], his heirs, executors, administrators, or assigns, shall pay or cause to be paid unto the said [*mortgagee*], his executors, administrators, or assigns, the sum of £—— of lawful money of the United Kingdom, *with interest for the same after the rate of 5l. per cent. per annum, on the 1st day of March now next ensuing, without making any deduction out of the same sum and interest respectively* (*h*) for taxes, or on any other account whatsoever, then immediately thereupon the said [*mortgagee*], his heirs or assigns, shall, at the request, costs, and charges of the said [*mortgagor*], his heirs or assigns, reconvey or reassure the said messuage, farm, lands, hereditaments and premises hereby appointed (*i*), or otherwise assured, or intended so to be, unto and to the use of the said [*mortgagor*], his heirs or assigns, in such manner as he or

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demption of the said hereditaments next hereinafter contained."

(*h*) Or if the money is to remain a certain number of years upon the security, (say until the 1st of September, 1835), then substitute for the words in italics, (supposing the mortgage to be for 1000*l.*)—

Variation, where principal is payable at a future time, and interest in the mean time.

"with interest for the same, after the rate of *5l. per cent. per annum*, at the times and in manner following, that is to say, the sum of *25l.* being one half year's interest on the said principal sum, on the first day of March next ensuing the date of these presents, the like sum of *25l.* being another half year's interest as aforesaid, on the first day of September next, and the like sum of *25l.*, being a half year's interest as aforesaid, on every first day of March and first day of September, until the first day of September which will be in the year 1835, and on the said last-mentioned day the sum of 1025*l.*, being the said principal sum of 1000*l.* so advanced and lent as aforesaid, and the last half year's interest thereon, without making any deduction out of the said sums of money, or any part of the same respectively."

See a shorter mode of reserving the principal at a future day and interest in the mean time, *ante*, p. 239, and *post*, p. 270.

(*i*) "and released."

APPOINTMENT AND RELEASE IN FEE, WITH POWER OF SALE.

they shall direct, free from all charges and incumbrances to be made or occasioned by the said [*mortgagee*], his heirs and assigns, in the meantime (*k*). [PROVIDED ALSO, and it is hereby declared and agreed (*l*), by and between the said parties to these presents, that, in case default shall be made in payment of the said sum of 1000*l.*, and the interest thereof, or either of them, or any part of the same respectively, at *the time* (*m*), and in the manner mentioned in the proviso lastly hereinbefore contained, contrary to the true intent and meaning of these presents, and if the said [*mortgagee*], his heirs, executors, administrators, or assigns, shall give to the said [*mortgagor*], his heirs or assigns, or leave at his or their usual or last known place or places of abode, —— calendar months' previous notice in writing, under the hand or hands of the said [*mortgagee*], his executors, administrators, or assigns, or some or one of them, of his or their intention to proceed to a sale of the said messuage, farm, lands, hereditaments, and premises hereby appointed (*n*), or intended so to be, unless the principal and interest monies hereby intended to be secured shall be paid at the expiration of the said notice; then it shall be lawful for the said [*mortgagee*], his heirs, executors, administrators, or assigns, immediately, or at any other time after the ex-

Power of sale in default of payment,

on giving three calendar months' previous notice.

Form of proviso for redemption, where there is a power of sale.

(*k*) It is usual, where a power of sale is given in default of payment, to frame the proviso in these terms, instead of declaring, as in the former precedents, that, on performance of the proviso by the mortgagor, his heirs, &c., the estate shall cease; because, in the latter case, the estate may have ceased when the mortgagee sells, and the title of the purchaser thus be defeated; the fact, however, of the deeds being in the possession of the mortgagee is strong *primâ facie* evidence of the money not having been paid on the day; but, as it may possibly have been tendered and refused, it is as well to guard against the possible danger.

(*l*) If the instrument is to be a common mortgage only, without a power of sale, the parts in brackets may be omitted.

(*m*) Or, if there be more than one day appointed for the payment—"the respective times."

(*n*) "and released."

piration of the said notice, so long as the said sum of 1000*l.*, and interest, or any other monies hereby intended to be secured, or any part thereof respectively, shall remain unpaid, without the necessity of any consent or concurrence on the prrt of the said [*mortgagor*], his heirs or assigns, to sell and absolutely dispose of the said messuage, farm, lands, hereditaments and premises hereby appointed (*o*), or intended so to be, or any part of the same, either together or in parcels, and either by public auction or by private contract, with liberty to buy in the same, or any part thereof, at any auction or auctions, and re-sell the hereditaments so bought in at any future auction or by private contract, without being answerable for any loss, expense, or diminution of price which shall be consequent thereupon (*p*), and also, if it shall be deemed expedient so to do, to rescind or vary the terms of any contract for sale that shall have been entered into, and to convey or assure the same hereditaments, when sold, unto the purchaser or purchasers thereof, or as he, she, or they shall direct or appoint: And out of the money which shall arise from such sale or sales, and the rents and profits which shall have come to the hands of the said [*mortgagee*], his heirs or assigns, previously thereto, by virtue of these presents, in the first place to pay or retain and satisfy unto himself and themselves, the said [*mortgagee*], his heirs, executors, administrators, or assigns, the costs and expenses

APPOINTMENT AND RELEASE IN FEE, WITH POWER OF SALE.

Application of monies arising from the sale, &c.

(*o*) "and released."

(*p*) These words should always be inserted, as an objection is sometimes taken to the power of a trustee to buy in the property at a sale by auction; and, in a late case, where the assignee of a bankrupt offered real property to sale by auction, in two lots, on different days, and, without the authority of the creditors, bought in both lots, Lord *Eldon* decided that he was liable to the loss arising on a re-sale of one of the lots, although there was a gain upon the other, which made the balance of the whole in favour of the estate. *Ex parte Lewis*, 1 Glynn & Jameson's Bankruptcy Cases, 69. And in a subsequent case, Sir *J. Leach* expressed his concurrence in the rule adopted in *Ex parte Lewis*, though his Honor was of opinion, that, in the case before him, the subsequent proceedings of the creditors had precluded them from objecting to the conduct of the assignee. *Ex parte Buxton*, 1 Gly. & Jam. 355.

Utility of an authority to a trustee for sale to buy in at an auction.

APPOINTMENT AND RELEASE IN FEE, WITH POWER OF SALE.

attending the said sale or sales, or which shall have been incurred by him or them (*q*) in obtaining the possession of, or enforcing any contract or contracts for the sale of the said hereditaments, and all other expenses arising or incurred in the execution of the said trust (*r*), and in the next place to retain or pay and satisfy unto him the said [*mortgagee*], his executors, administrators, or assigns, the said principal sum of 1000*l.*, with interest for the same after the rate aforesaid, or so much of the same sum and interest as shall then remain unpaid, clear of all deductions as aforesaid; and in case, after full payment and satisfaction thereof, any sum or sums of money shall remain in the hands of the said [*mortgagee*], his heirs, executors, administrators, or assigns, then, UPON TRUST, to pay such residue or surplus unto the said [*mortgagor*], his heirs, executors, administrators, or assigns, or as he or they shall direct. PROVIDED ALSO, and it is hereby further declared and agreed, that every receipt which shall be given by the said [*mortgagee*], his heirs, executors, administrators, or assigns, or his or their agent or agents, to the purchaser or respective purchasers of the said hereditaments and premises, so to be sold as aforesaid, for his, her, or their purchase-money, or respective purchase-monies, or any part of the same respectively, shall effectually discharge the person or persons paying the same from all responsibility in respect of the application thereof; and that the purchaser or purchasers of the said hereditaments and

To pay expenses, and principal and interest monies.

To pay surplus to mortgagor.

Mortgagee's receipt, to discharge purchasers.

Purchasers not obliged to inquire into the propriety of sale.

(*q*) If an insurance is to be effected, add—

"in effecting or keeping on foot any insurance or insurances, as hereinafter provided, and interest thereon, or,"

Whether costs included in *ad valorem* stamp on mortgages.

(*r*) Some persons, from abundant caution, limit the amount of costs to a given sum, and affix to the deed an *ad valorem* stamp, sufficient to cover such sum; but the precaution seems to be quite unnecessary. A Court of Equity would allow a trustee, or mortgagee (who for this purpose is in the character of trustee,) to retain costs without any express provision, and the insertion of such a provision cannot render the deed liable to any additional duty. If interest is payable upon the costs, the point is not so clear; and then it seems prudent to limit the aggregate sum recoverable under the security to a given amount, a form for which will be found in the sequel.

APPOINTMENT AND RELEASE IN FEE, WITH POWER OF SALE.

premises shall not be obliged to inquire whether such default has been made, or such notice given as hereinbefore required, previously to such sale or sales being made as aforesaid, or into any other matter or thing connected with the propriety or regularity of any sale or sales, and shall not be affected by express notice from the said [*mortgagor*], his heirs, executors, administrators, or assigns, or any other person or persons, that no such default has been made or notice given as aforesaid, or that such sale or sales is or are unnecessary and improper. PROVIDED ALSO, and it is hereby further declared and agreed, that the power of sale hereinbefore contained shall not extend, or be construed to extend, to destroy, prejudice, or affect the rights or remedies of the said [*mortgagee*], his heirs, executors, administrators, or assigns, as a mortgagee or mortgagees of the said hereditaments and premises, under or by virtue of these presents, but that it shall be lawful for him or them to proceed to a foreclosure of the equity of redemption of the said premises, or otherwise to enforce his or their said rights and remedies as a mortgagee or mortgagees, in the same manner, and as effectually, to all intents and purposes, as if no such power of sale had been herein contained.] AND the said [*mortgagor*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*mortgagee*], his heirs, executors, administrators, and assigns, in manner following, (that is to say), that the said [*mortgagor*], his heirs, executors, administrators, or assigns, will duly pay or cause to be paid unto the said [*mortgagee*], his executors, administrators, or assigns, the said sum of £——, with interest for the same after the rate aforesaid, at the time (*r*) and in manner hereinbefore appointed for payment of the same, according to the true intent and meaning of these presents; and also, that the said [*mortgagor*] now hath in himself good right and absolute authority by these presents to direct, limit, and appoint (*s*), the said messuage, farm, lands, heredita-

Mortgagee's right of foreclosure, &c., not to be affected.

Mortgagor covenants—

To pay principal and interest monies;

That he has a right to assure;

(*r*) "or respective times."

(*s*) "or the said [*mortgagor*] and [*trustee*], or one of them, to release or otherwise assure."

APPOINTMENT AND RELEASE IN FEE, WITH POWER OF SALE.

ments and premises hereby appointed (*t*), or intended so to be, to the use of the said [*mortgagee*], his heirs and assigns, in manner aforesaid, and according to the true intent and meaning of these presents; *And also*, that (subject to the declaration and agreement hereinafter contained) it shall be lawful for the said [*mortgagee*], his heirs and assigns, from time to time, and at all times for ever hereafter, peaceably and quietly to enter into or upon, and hold and enjoy the said messuage, farm, lands, hereditaments, and premises, and every part of the same, and to take the rents and profits of the same, without any interruption or denial whatsoever, from or by the said [*mortgagor*], or any other person or persons whomsoever; And that free and clear from all charges and incumbrances whatsoever; *And also*, that the said [*mortgagor*] and his heirs, and every person whosoever having or rightfully claiming any estate, right, title, or interest, at law or in equity, in, to, upon or out of the said messuage, farm, lands, hereditaments, and premises hereby appointed (*t*), or intended so to be, or any part thereof, will, at any time or times hereafter, upon every reasonable request of the said [*mortgagee*], his heirs, executors, administrators, or assigns, and at the costs and charges of the said [*mortgagor*], his heirs or assigns, [until the said hereditaments and premises shall have been sold and conveyed, under the power of sale hereinbefore contained, and afterwards at the costs and charges of the purchaser or purchasers thereof, his, her, or their appointees, heirs, or assigns], make, do, acknowledge, levy, suffer, execute, and perfect every such lawful and reasonable act, deed, appointment, conveyance or assurance in the law whatsoever, either by fine, common recovery, release, confirmation, or otherwise howsoever, for more effectually or satisfactorily limiting, appointing (*x*), confirming, or otherwise assuring the said messuage, farm, lands, hereditaments and premises, and every part of the same, to the use of the said [*mortgagee*], his heirs and assigns, or as he or they shall direct, accord-

For quiet enjoyment.

Free from all incumbrances.

For further assurance.

(*t*) "and released."

(*x*) "granting, releasing."

ing to the true intent and meaning of these presents, as by the said [*mortgagee*], his heirs or assigns, or his or their counsel in the law, shall be reasonably advised and required. PROVIDED ALSO, and it is hereby further declared and agreed, by and between the said parties to these presents, and particularly the said [*mortgagee*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*mortgagor*], his heirs and assigns, that, until default shall be made in payment of the said sum of £——, or the interest thereof, or any part of the same respectively, contrary to the true intent and meaning of the proviso or agreement for redemption hereinbefore contained, it shall be lawful for the said [*mortgagor*], his heirs or assigns, to hold and enjoy, and to take the rents and profits of the said messuage, farm, lands, hereditaments, and premises hereby appointed (*y*), or intended so to be, without any interruption or denial whatsoever of or by the said [*mortgagee*], his heirs, executors, administrators, or assigns, or of or by any person or persons rightfully claiming or to claim by, from, under, or in trust for him or them; [*And also*, that he the said [*mortgagee*], his heirs, executors, administrators, or assigns, will not, at any time or times hereafter, proceed to a sale of the said messuage, farm, lands, and hereditaments hereby appointed (*z*), or intended so to be, or any part thereof, until such default has been made in the payment of the said principal and interest monies hereby intended to be secured, and such notice given to the said [*mortgagor*], his heirs or assigns, as are hereinbefore mentioned and provided for that purpose]; [but so, nevertheless, that these provisoes and covenants lastly hereinbefore contained shall not affect any purchaser or purchasers under the power of sale hereinbefore contained, or any person or persons claiming under such purchaser or purchasers], any thing hereinbefore contained to the contrary notwithstanding. IN WITNESS, &c.

APPOINTMENT AND RELEASE IN FEE, WITH POWER OF SALE.

Proviso for quiet enjoyment by mortgagor until default.

Covenant by mortgagee not to sell, until default in payment, and notice.

(*y*) Add covenant to insure, if intended, *ut ante*, p. 241.

(*z*) "and released."

APPOINTMENT AND DEMISE, WITH AN ASSIGNMENT OF LIFE-POLICY.

MORTGAGE *for a* TERM *of* YEARS, *by* APPOINTMENT *and* DEMISE, *and* ASSIGNMENT *of a* POLICY *of* LIFE-INSURANCE, *to two Persons* JOINTLY, *(being Trustees)* (*a*): PRINCIPAL *to be payable at a future Day, and* INTEREST *half-yearly in the mean Time.* (VARIATION, *where the Loan is of* STOCK *in the* PUBLIC FUNDS) (*b*).

Parties.

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, BETWEEN [*mortgagor*], of &c., of the one part; and [*mortgagees*], of &c., of the other part;

Recitals.

(Recite conveyance to mortgagor to the usual uses to prevent dower).

Of life-policy.

AND WHEREAS, by a policy of assurance, bearing date the —— day of —— now last, and numbered ——, the society for equitable assurances on lives and survivorships assured to the said [*mortgagor*] the sum of 600*l.* to be paid to his executors, administrators, or assigns, after the decease of the said [*mortgagor*], whensoever the same should happen, at or under the annual premium of 14*l.* 8*s.* 6*d.*

Agreement for loan and mortgage.

AND WHEREAS the said [*mortgagees*] have agreed to advance and lend to the said [*mortgagor*] the sum of 800*l.* (*c*) *on having the same, with interest,* secured to them by the [bond and] covenant of the said [*mortgagor*], and by a mortgage,

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As to mortgages to trustees.

(*a*) The only peculiarity in a mortgage to trustees is, that a declaration is inserted, that the money belongs to them on a joint account, (*ut post*, p. 277), and the receipt of the survivor shall be a discharge. In all other respects, the mortgage is the same as if it were made to them for their own benefit; for the trust ought not to appear on the face of the deed; and any declaration of trust, which it is thought proper that the mortgagee shall execute in favour of the parties beneficially interested, should be contained in a separate instrument.

(*b*) As to loans of stock, *vide ante*, Vol. 3, p. 245.

Variation, where the mortgage is to secure stock.

(*c*) If the mortgage is to secure the re-transfer of stock, make the variation in the notes throughout referred to by the letter (*c*), instead of the

in the manner hereinafter mentioned, of the closes, pieces or parcels of ground, and hereditaments hereinafter described and intended to be hereby appointed and demised, with their appurtenances, and of the said policy of assurance, and the said sum of 600*l.* assured thereby, and all other benefit and advantages to be had or obtained under or by virtue of the same. [AND WHEREAS, in pursuance and part performance of the said agreement, the said [*mortgagor*] hath this day executed and given to the said [*mortgagees*] a bond or obligation in writing, bearing even date with these presents, and hath thereby become bound to the said [*mortgagees*] in the penal sum of 1600*l.*, with a condition thereunder written for making void the same (*c*), *upon payment by the said* [*mortgagor*], *his heirs, executors, or administrators, to the said mortgagees, their executors, administrators, or assigns, of the sum of* 800*l.*, *with interest for the same after the rate*, at the times and in manner in the condition of the said bond or obligation and hereinafter mentioned (*e*).]

APPOINTMENT AND DEMISE, WITH AN ASSIGNMENT OF LIFE-POLICY.

Mortgage bond.

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words in italics, in the text: Here the substituted words will be—

"Consolidated Three Pounds *Per Centum* Annuities*, on having the re-purchase thereof, and the payment in the mean time of a sum equivalent to the dividends thereon."

(*c*) "Upon the re-purchase by the said [*mortgagor*], his heirs, executors, or administrators in, or by the transfer by him or them into the names or name of the said [*mortgagees*], or the survivor of them, his executors or administrators, of the said sum of 800*l.* Consolidated Three Pounds *Per Centum* Annuities, and the payment in the mean time of a sum equal to the amount of the dividends thereon."

(*e*) The inexpediency of a bond as an accompaniment to a mortgage containing the usual covenant on the part of a mortgagor to pay, has already been pointed out, (*vide ante*, p. 235). It is extraordinary, that the practice of mortgagees taking bonds as a collateral security should have so extensively prevailed.

As to bonds accompanying mortgages.

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* This is the description of the stock, according to the act of Parliament creating it.

APPOINTMENT AND DEMISE, WITH AN ASSIGNMENT OF LIFE-POLICY.

Testatum. In consideration of 800*l.*

NOW THIS INDENTURE WITNESSETH, that, in pursuance and further performance of the said agreement, and in consideration of the sum of 800*l. of lawful money of the United Kingdom to the said* [*mortgagor*] *in hand paid by the said* [*mortgagees*] *on or immediately before the execution of these presents, the receipt of which said sum of* 800*l.* (*c*) the said [*mortgagor*] doth hereby acknowledge, and of and from the same sum, and every part thereof, doth hereby acquit, release, and for ever discharge the said [*mortgagees*], their executors, administrators, and assigns, the said [*mortgagor*], in exercise and execution of the power or authority to him for that purpose reserved or limited by the said hereinbefore recited indentures of lease and release, of the —— and —— days of ———, *Doth*, by this

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Variation, where the loan is of stock.

(*c*) "Consolidated Three Pounds *Per Centum* Annuities, on the day of the date of these presents, transferred by the said [*mortgagees*] to the said [*mortgagor*] in the books of the Governor and Company of the Bank of England, as hereinbefore recited, the transfer of which said sum of Annuities, in manner aforesaid, &c."

Sometimes the stock is sold out by the mortgagee, and the proceeds paid over to the mortgagor. A recital may then be introduced, to this effect:—

"AND WHEREAS, in pursuance of the said agreement, the said [*mortgagees*] have, on the day of the date hereof, sold the sum of 800*l.* Consolidated Three Pounds *Per Centum* Annuities, standing in their names in the books of the Governor and Company of the Bank of England, which has produced, after paying the expenses of the said sale, the clear sum of 729*l.* 8*s.*"

The *testatum* clause then proceeds thus:—

"Now, &c., that, in consideration of the said sum of 729*l.* 8*s.*, (being the clear proceeds of the said sum of 800*l.* Consolidated Three Pounds *Per Centum* Annuities, so sold as aforesaid), paid by the said [*mortgagees*] to the said [*mortgagor*] at or immediately before the execution of these presents, the receipt of which said sum of 729*l.* 8*s.*" &c.

present deed or instrument in writing, sealed and delivered by him in the presence of and attested by the two credible persons (*g*) whose names are intended to be hereupon indorsed as witnesses attesting the sealing and delivery of these presents by the said [*mortgagor*], direct, limit, and appoint, that the closes, pieces or parcels of ground, and hereditaments hereinafter particularly described and intended to be hereby demised, with their appurtenances, shall henceforth go, remain, and be, To THE USE of the said [*mortgagees*], their executors, administrators, and assigns, for and during the term of two thousand years, to be computed from the day of the date of these presents, without impeachment for any manner of waste; *Subject, nevertheless,* to the proviso or agreement hereinafter contained for making void the same term. AND THIS INDENTURE FURTHER WITNESSETH, that, in pursuance and further performance of the said agreement, and for the consideration aforesaid, he the said [*mortgagor*] hath granted, bargained, sold, demised, and confirmed, and by these presents doth grant, &c., unto the said [*mortgagees*], their heirs, executors, administrators, and assigns, *(parcels and general words, ut ante,* p. 258 (*h*);*)* And the reversion, &c.; And all deeds, &c. (*ut ante,* p. 258); To HAVE AND TO HOLD the said closes, pieces and parcels of ground, and hereditaments, with their and every of their appurtenances, unto the said [*mortgagees*], their executors, administrators, and assigns, henceforth for and during the said term of two thousand years, for which the said closes, pieces or parcels of groundand hereditaments are hereby appointed as aforesaid, and by way of corroboration and confirmation of the said term; *Subject, nevertheless,* to the proviso or agreement for redemption hereinafter contained: [YIELDING AND PAYING therefor yearly and every year during the said term, at the feast of St. Michael the Archangel, the rent of

APPOINTMENT AND DEMISE, WITH AN ASSIGNMENT OF LIFE-POLICY.

Mortgagor appoints to mortgagee for 2000 years, subject to proviso.

Second *testatum.*

Mortgagor demises to mortgagee.

To hold during 2000 years, subject to proviso for redemption.

(*g*) Such was the requisition of the power in this case.

(*h*) Where the mortgage comprises less than the mortgagor's whole estate, of course the clause of "all the estate" &c. is omitted.

APPOINTMENT AND DEMISE, WITH AN ASSIGNMENT OF LIFE-POLICY.

one pepper corn only, if the same shall be lawfully demanded (*i*)]. And this indenture further witnesseth, that, in pursuance and further performance of the said agreement, and for the consideration aforesaid, he the said [*mortgagor*] *Hath* bargained, sold, assigned, transferred, and set over, and by these presents *Doth* bargain &c., unto the said [*two mortgagees*], their executors, administrators, and assigns, the said policy of assurance hereinbefore recited, and the said sum of 600*l.* assured thereby, and all other the monies, benefits, and advantages to be had, recovered, or obtained, under or by virtue of the said policy, and full power and authority to ask, demand, sue for, recover, and receive, and give effectual acquittances, releases, and discharges for the said sum of 600*l.*, and other monies; *And* all the right, title, interest, possibility, property, claim, and demand whatsoever, both at law and in equity, of him the said [*mortgagor*], in, to, out of, or upon the said policy, monies and premises hereby assigned, or intended so to be; To have and to hold the said policy, monies, and all other the premises hereby assigned, or intended so to be, unto the said [*mortgagees*], their executors, administrators, and assigns absolutely for ever; *Subject, nevertheless,* to the proviso or agreement for redemption hereinafter contained. Provided always, and it is hereby agreed and declared between and by the parties hereto, that if the said [*mortgagor*], his heirs, executors, administrators, or assigns, do and shall, on the —— day of ——, which will be in the year 1835, *pay or cause to be paid unto the said* [*mortgagees*], *or the survivor of them, or the executors or administrators of such survivor, or their or his assigns, the sum of* 800*l. of lawful money of the United Kingdom, together with interest for the same in the mean time after the rate of* 5*l. for every* 100*l. by the year, such interest to be paid in equal portions on the —— day of ——, and the —— day of ——, in every year, (the first half yearly payment thereof to be made on the ——*

In consideration aforesaid, mortgagor assigns to mortgagees, &c., policy of insurance.

And all right, &c.

Habendum to mortgagees, subject to proviso for redemption.

Proviso that term shall cease and policy be re-assigned, on payment of 800*l.* and interest.

(*i*) A *reddendum* is altogether unnecessary.

day of —— next ensuing the date of these presents (*c*),) Then the said term of 2000 years shall absolutely cease, determine, and be void; and the said [*mortgagees*], their executors, administrators, or assigns, shall and will at the request, and costs and charges of the said [*mortgagor*], his executors, administrators, or assigns, re-assign the said policy of assurance, monies, and premises hereby assigned, or intended so to be, unto the said [*mortgagor*], his executors, administrators, or assigns, or as he or they shall in that behalf order or direct, free from all incumbrances whatsoever, made, done, or committed by the said [*mortgagees*], their executors, administrators, or assigns, [so as, for the making of such assurances, they, the said [*mortgagees*], their executors, administrators, or assigns, be not compelled or compellable to go or travel from the place or places of their or any of their abode or dwelling]: AND the said [*mortgagor*] doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the

APPOINTMENT AND DEMISE, WITH AN ASSIGNMENT OF LIFE-POLICY.

Mortgagor covenants to pay said money and interest.

(*c*) "At his or their own costs and charges, repurchase or transfer, or cause to be repurchased or transferred in or into the names or name of the said [*mortgagees*], or the survivor of them, or the executors or administrators of such survivor, or their or his assigns, in the books of the Governor and Company of the Bank of England, the sum of 800*l.* Consolidated Three Pounds *Per Centum* Annuities, and do and shall in the mean time, until the same Annuities shallbe so repurchased or transferred, pay or cause to be paid unto the said [*mortgagees*], or the survivor of them, or the executors or administrators of such survivor, or their or his assigns, a sum or sums of money equal in amount to the half-yearly dividends which would have become payable to them or him in respect of the said 800*l.* Consolidated Three Pounds *Per Centum* Annuities, if the same had continued standing in the names or name of the said [*mortgagees*], or the survivor of them, his executors or administrators, in the said books of the Governor and Company of the Bank of England, such payments from time to time to be made on the respective days and times on which such dividends would have become payable."

Variation in proviso for redemption where the loan is of stock.

APPOINTMENT AND DEMISE, WITH AN ASSIGNMENT OF LIFE-POLICY.

said [*mortgagees*], their executors, administrators, and assigns, that he, the said [*mortgagor*], his heirs, executors, administrators, and assigns, will *pay or cause to be paid unto the said* [*mortgagees*], *their executors, administrators, or assigns, the said sum of* 800*l.*, *and the interest thereof, at the several times mentioned in the aforesaid proviso or agreement for the payment thereof* (*c*), without any deduction or abatement whatsoever, according to the true intent and meaning of these presents; *And also* that he, the said [*mortgagor*], will, during the continuance of this present security, from time to time, pay or cause to be paid to the said society for equitable assurances on lives and survivorships the said annual premium of 14*l.* 8*s.* 6*d.* and any other monies which shall be required for keeping the said policy on foot, when and as the same shall become due and payable in respect of the said policy hereby assigned, or intended so to be; and also will, from time to time, deliver to the said [*mortgagees*], their executors, administrators, or assigns, the receipts for the premium or monies so paid; And that, if the said [*mortgagor*] shall at any time or times refuse or neglect to pay the said annual premium, or to deliver the said receipts for the payment thereof within seven days after the —— day of ——, on which day the said annual premium will from time to time become due,

Covenant by mortgagor, to pay the annual premium on policy.

Variation in covenant where loan is of stock.

(*c*) " At his or their own costs and charges, repurchase or transfer, or cause to be repurchased or transferred, in or into the names or name of the said [*mortgagees*], or the survivor of them, or the executors or administrators of such survivor, or their or his assigns, in the books of the Governor and Company of the Bank of England, the sum of 800*l.* Consolidated Three Pounds *Per Centum* Annuities, on or at the day or time mentioned in the said proviso or agreement for redemption hereinbefore contained, and will in the mean time, until the said Annuities shall be so repurchased or transferred, pay or cause to be paid unto the said [*mortgagees*], or the survivor of them, or the executors or administrators of such survivor, or their or his assigns, such sum or sums of money, at such days or times, and in such manner as is or are mentioned and provided in and by the said proviso or agreement for redemption."

it shall be lawful for the said [*mortgagees*], their executors, administrators, or assigns, to pay to the said society the said annual premium, and all other monies which may be required for keeping the said policy on foot; and that he the said [*mortgagor*], his heirs, executors, or administrators, shall and will in that case, upon the request of the said [*mortgagees*], their executors, administrators, or assigns, pay to the said [*mortgagees*], their executors, administrators, or assigns, the sum or sums of money which shall be so paid by them from time to time to the said society, with interest for the same respectively, after the rate aforesaid, computed from the time or respective times of paying the same; and that the said closes, pieces, or parcels of ground and hereditaments hereby appointed and demised, or intended so to be, and the policy of assurance, monies, and premises hereby assigned, or intended so to be, shall not be redeemed or redeemable until full payment to the said [*mortgagees*], their executors, administrators or assigns, as well of the sum or sums which shall be so paid by them to the said society as aforesaid, and the interest thereof to be computed as aforesaid, as of the said sum of 800*l.* (*c*) *hereinbefore secured, and the interest thereof; Provided nevertheless* that the total amount of the principal money to be ultimately recoverable under or by virtue of these presents (*k*), shall not exceed the sum

APPOINTMENT AND DEMISE, WITH AN ASSIGNMENT OF LIFE-POLICY.

And said mortgaged estate and policy shall not be redeemed until payment be made of sums so advanced, as well as original sum

Proviso limiting sums to £——.

(*c*) "Consolidated Three Pounds *Per Centum* Annuities hereinbefore secured, and the payments in the nature of dividends thereon as aforesaid."

Variation, where loan is of stock.

(*k*) "In respect of the sum or sums of money to be paid or advanced by the said [*mortgagees*], their executors, administrators, or assigns, as aforesaid"*.

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* By the late Stamp Act, where a mortgage, &c., is made "as a security for the transfer or re-transfer of any share in any of the Government or Parliamentary stocks or funds, or in the stock and funds of the Governor and Company of the Bank of England, or of the East India Company, or of the South Sea Company, in consideration of stock or money advanced or lent at the time, or previously due and owing or forborne to be paid, being payable;" the same duty is payable "as on a mortgage, for a sum of money equal to the value of the stock or fund secured, *according to the*

Stamp, where mortgage is of stock.

APPOINTMENT AND DEMISE, WITH AN ASSIGNMENT OF LIFE POLICY.

of 1000*l.* (*l*). And the said [*mortgagor*] doth for himself, his heirs, executors, and administrators, covenant and agree with the said [*mortgagees*], their executors, administrators, and assigns, by these presents, in manner following, (that is to say), That he the said [*mortgagor*] hath in himself good right, full power, and lawful and absolute authority to direct, limit, and appoint, grant, bargain, sell, and demise the said closes, pieces or parcels of ground, and hereditaments hereby appointed and demised, or intended so to be, with their appurtenances, unto the said [*mortgagees*], their executors, administrators, and assigns, for the aforesaid term of two thousand years, and also to bargain, sell, and assign the said policy, monies, and premises hereby assigned, or intended so to be, unto the said [*mortgagees*], their executors, administrators, and assigns, in manner aforesaid, and according to the true intent and meaning of these presents; And that the said [*mortgagor*] will not at any time or times hereafter do or commit any act or default whatsoever, whereby, or by means whereof, the said policy of assurance hereby assigned, or intended so to be, shall be impeached, or become void, or any additional premium or premiums of insurance become payable; *And also*, that, if default shall be made *in payment of the said sum of* 800*l. or the interest thereof* (*c*), or any

Mortgagor covenants that he has full power to demise lands and assign policy.

That, if default be made in payment of said monies,

(*l*) "200*l.*"

(*c*) "In the repurchase or transfer of the said sum of 800*l.* Consolidated Three Pounds *Per Centum* Annuities, or any part thereof, or in the payment in the meantime of the half yearly sums of money hereinbefore mentioned, or any of them."

average price thereof on the day of the date of the mortgage or other instrument aforesaid, or on either of the ten days preceding." By another clause, where the mortgage shall be made "as a security for the payment of a sum of money, and also for the transfer and retransfer of a share in any of the said stocks or funds, the said *ad valorem* duty shall be paid in respect of *each*." In the present case, therefore, (*i. e.* in the case of a stock-mortgage), there should be a separate stamp for the money to be expended on the life insurance, according to the limit fixed to such advances; though, in a money-mortgage, it is sufficient to affix a stamp extending to the aggregate sum advanced on the several accounts. The distinction between fire and life insurance, in regard to stamp, has been already adverted to, *vide ante*, p. 244.

part thereof respectively, contrary to the proviso or agreement for redemption hereinbefore contained, and the true intent and meaning of these presents, Then, and in such case, it shall be lawful for the said [*mortgagees*], their executors, administrators, or assigns, at any time thereafter, during the said term of two thousand years, into and upon all and every the said closes, pieces or parcels of ground and hereditaments hereby appointed and demised, or intended so to be, to enter, and the same from time to time to have, hold, occupy, and possess and enjoy, and to receive and take the rents, issues, and profits thereof; and also to receive and take the said policy, monies, and premises hereby assigned, or intended so to be, for their own benefit, without any lawful hindrance, interruption, or disturbance whatsoever, of, from, or by the said [*mortgagor*], his heirs, executors, or administrators, or any other persons or person having, or lawfully or equitably claiming, or who shall or may have, or lawfully or equitably claim, any estate, right, title, interest, or demand in, to, or out of the said closes, pieces or parcels of ground, and premises hereby appointed and demised, and assigned, or intended so to be, or any part thereof; *And that* free and clear, and freely and clearly and absolutely acquitted, exonerated, and discharged, or otherwise by the said [*mortgagor*], his heirs, executors, or administrators, protected, saved, and kept harmless and indemnified of, from, and against all and all manner of [former and other directions, limitations and appointments, gifts, grants, bargains, sales, jointures, dowers, mortgages, uses, wills, annuities, rent-charges, rents-seck, and arrears of rent, fines, issues, amerciaments, statutes, recognizances, executions, extents, seizures, and sequestrations, and all other] estates, titles, troubles, charges, debts and incumbrances whatsoever; *And moreover*, that if default shall be made *in payment of the said sum of* 800*l.*, *or the interest thereof* (*c*), or any part thereof re-

APPOINTMENT AND DEMISE, WITH AN ASSIGNMENT OF LIFE-POLICY.

mortgagees may enter upon said lands;

and receive said policy.

And that free from incumbrances.

And for further assurance.

(*c*) "In the repurchase or transfer of the said Consolidated Three Pounds *Per Centum* Annuities, or any part thereof, or in the payment in the meantime of the half yearly sums of money hereinbefore mentioned, or any of them."

Variation, where loan is of stock.

APPOINTMENT AND DEMISE, WITH AN ASSIGNMENT OF LIFE-POLICY.

spectively, contrary to the proviso or agreement for redemption hereinbefore contained, and the true intent and meaning of these presents, then and in such case (*m*) he, the said [*mortgagor*], and his heirs, and all and every persons and person having, or lawfully or equitably claiming, or who shall or may have, or lawfully or equitably claim, any estate, right, title, or interest, of, in, to, or out of the said closes, pieces or parcels of ground, and hereditaments hereby appointed and demised, or intended so to be, or any of them, or any part or parts thereof, shall and will, from time to time, and at all times thereafter, during the said term of two thousand years, upon the request of the said [*mortgagees*], their executors, administrators, or assigns, or any of them, but at the expense of the said [*mortgagor*] his heirs, executors, administrators, or assigns, make, do, and execute, or cause or procure to be made, done, and executed, all and every such further and other lawful and reasonable acts, deeds, matters, things, devices, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely directing, limiting and appointing, granting, conveying, and assuring of the said closes, pieces or parcels of ground, and hereditaments hereby demised, or intended so to be, with their appurtenances, either unto the said [*mortgagees*], their executors, administrators, and assigns, for the then residue of the said term of two thousand years, or unto and to the use of the said [*mortgagees*],

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Observation upon the covenant for further assurance in mortgages.

(*m*) This mode of framing the covenant for further assurance in mortgages, though usual, is not correct. It should not be confined to the event of default having been made in performance of the proviso, except as to any further estate which the mortgagee is to take in addition to that which is comprised by the mortgage (*ut ante*, p. 241); for, with respect to the term or other interest professed to be assured by the mortgage, if any defect should be discovered, the mortgagee ought to be enabled to call upon the mortgagor immediately to repair it, though the time for payment of the money has not arrived. Indeed, it is before default, that the covenant is most likely to be resorted to; for afterwards a mortgagee, finding a defect in his assurance, would most probably enforce the payment of the money under his bond or covenant. (*Vide* forms of covenants framed accordingly, *ante*, pp. 240, 250).

their heirs, and assigns, as by the said [*mortgagees*], their executors, administrators, or assigns, or any of them, or their counsel in the law, shall be reasonably devised, advised, and required. PROVIDED ALWAYS, and it is further agreed and declared between and by the said [*mortgagor*] and the said [*mortgagees*], and the true intent and meaning of these presents nevertheless further is, that it shall be lawful for the said [*mortgagor*], his heirs, appointees, and assigns, peaceably and quietly to have, hold, occupy, possess, and enjoy all the said closes, pieces, or parcels of ground and hereditaments hereby appointed and demised, or intended so to be, with their appurtenances, and receive and take the rents, issues, and profits thereof, to his and their own use, until default shall be made *in payment of the said sum of* 800*l. or the interest thereof* (*c*), or any part thereof respectively, contrary to the proviso or agreement for redemption hereinbefore contained, and the true intent and meaning of these presents, without any hindrance, interruption, or disturbance whatsoever, of, from, or by the said [*mortgagees*], their executors, administrators, or assigns, or of, from, or by any other person or persons whomsoever, lawfully or equitably claiming, or to claim by, from, or under, or in trust for them or any of them. PROVIDED lastly, and it is hereby declared, that the said sum of 800*l.* (*c*), advanced and lent by them the said [*mortgagees*] to the said [*mortgagor*], as hereinbefore mentioned, was so advanced and lent out of monies belonging to them on a joint account, and after the decease of (*o*) either of them the said [*mortgagees*], the receipt or receipts of the (*p*) survivor of them, and after the decease of such survivor, the receipt or receipts of the ex-

APPOINTMENT AND DEMISE, WITH AN ASSIGNMENT OF LIFE-POLICY.

Proviso for enjoyment by mortgagor till default.

Declaration that receipt of survivor of mortgagees shall be a discharge.

(*c*) "In the repurchase or transfer of the said sum of 800*l.* Consolidated Three Pounds *Per Centum* Annuities, or any part thereof, or in the payment in the meantime of the several half yearly sums of money hereinbefore mentioned, or any of them."

Variation, where loan is of stock.

(*c*) "Consolidated Three Pounds *Per Centum* Annuities."

(*o*) If more than two "any or"

(*p*) If more than two "survivors or"

APPOINTMENT AND DEMISE, WITH AN ASSIGNMENT OF LIFE-POLICY.

ecutors or administrators of such survivor, shall be an effectual discharge or effectual discharges, for the said sum of 800*l.* *and the interest thereof, or any part thereof, and other* (*c*) the monies hereby intended to be secured to the person or persons (*q*) paying the same, and shall exonerate him, her, or them from all claims and demands of the representatives of the other (*r*) of them the said [*mortgagees*]. IN WITNESS, &c.

(*c*) " Consolidated Three Pounds *Per Centum* Annuities, or any part thereof, and"

(*q*) " repurchasing, transferring, and"

(*r*) If more than one " or others"

MORTGAGE IN FEE BY HUSBAND AND WIFE.

RELEASE *in* FEE, *and* COVENANT *for a* FINE *by* HUSBAND *and* WIFE *of the* WIFE'S LANDS, *by way of* MORTGAGE, *with Limitation of the* EQUITY OF REDEMPTION *to the* APPOINTMENT *of the* HUSBAND *and* WIFE, *and, in Default, to them in Fee* (*a*). (VARIATION *where* MORTGAGE *is for a* TERM).

Parties.

THIS INDENTURE, made the —— day of ——, in the year of our Lord —— , BETWEEN [*mortgagor*], of &c.,

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Cautions to be observed in preparing mortgages by husband and wife.

(*a*) In preparing mortgages by the husband and wife of her estate, care should be taken to make it distinctly apparent, whether the ownership in the equity of redemption is intended to be changed. Where the inheritance is in the wife simply, and a fine is levied to give effect to the mortgage, it is generally convenient to limit the estate *ultrà* the mortgage, in such a manner as to make it alienable on any future occasion without a fine. For this purpose, the estates are frequently limited to uses in favour of the husband to prevent dower, or, where it is not intended to newly mo-

and [*wife*], his wife, of the one part; and [*mortgagee*], of &c., of the other part. WHEREAS the said [*mortgagee*] and [*wife*], his wife, in right of the said [*wife*], are seised of or entitled to the messuage or tenement, lands and hereditaments hereinafter mentioned, and intended to be hereby granted, and the inheritance thereof in fee-simple, subject to the indenture of lease hereinafter mentioned:

MORTGAGE IN FEE BY HUSBAND AND WIFE.

Recital, that mortgagor and his wife are seised in her right.

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del the estate, farther than for the purposes of alienation, to such uses as the husband and wife, or the wife alone, shall appoint; and, in default of appointment, to her in fee. In whatever way the limitations are framed, it is prudent to express the intention to vary the ownership in the recitals of the deed; for, the mere direction in the proviso for redemption to the mortgagee to convey to uses, differing from the antecedently subsisting limitations, will not have the effect of changing the rights and interests of the parties, but will be considered merely as an inaccuracy of expression. Thus, if husband and wife are seised in her right of lands of inheritance, and they levy a fine, and make a mortgage, and the proviso directs, that, upon the payment of the mortgage money by the husband and wife, or by the husband, the estate shall be conveyed to them and their heirs, or to the husband alone, (as the case may be), this will not have the effect of changing the interests of the parties, but the equitable inheritance will remain the property of the wife. *Rowell* v. *Walley*, 1 Ch. Rep. 218; *Brend* v. *Brend*, 1 Eq. Ca. Ab. 62, pl. 6; *S. C.* 2 Ch. Cas. 98; 1 Vern. 213; *Corbet* v. *Barker*, 1 Anstr. 138; 3 Anstr. 375; *Ruscombe* v. *Hare*, 6 Dow, 1.

And, upon the same principle, when the wife joins as dowress, it is clear that a direction in the proviso for redemption, that the mortgagee, upon payment, shall reconvey to the husband and wife, and their heirs, will not give the wife any interest in the equity of redemption. *Jackson* v. *Parker*, Amb. 687. (As to the distinction where the land is the wife's, and where she has a mere right to dower, *vide ante*, Vol. 4, p. 173.)

But, if the fine is covenanted to be levied to certain limitations formally set forth, shewing that the parties had something more than a mere mortgage in view, the estate will be subjected to these limitations, though there is no distinct recital to this effect. *Innes* v. *Jackson*, 16 Ves. 356; *S. C. in Dom. Proc.* 1 Bligh, 104; *Reeve* v. *Hicks*, 2 Sim. & Stu. 403.

It is better, however, in order to prevent ambiguity, always to declare the intention by recital, even when the object of the new modification of the ownership is simply to exclude the dower of the wife, to obviate an objection which has been discussed in an anterior part of the present work. (*Vide ante*, Vol. 4, p. 173).

MORTGAGE IN FEE BY HUSBAND AND WIFE.

Of agreement for a loan, and to settle equity of redemption.

AND WHEREAS the said [*mortgagor*] hath applied to and requested the said [*mortgagee*] to advance and lend him the sum of £——, which the said [*mortgagee*] hath agreed to do, upon having the repayment thereof, with interest for the same, secured by a mortgage of the said hereditaments in manner hereinafter mentioned: And the said [*mortgagor*] and [*wife*], his wife, have also determined to limit and assure the said hereditaments, and the equity of redemption thereof, subject to the said intended mortgage, to the uses and in manner hereinafter declared: NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of £——, of lawful money of the United Kingdom, paid by the said [*mortgagee*] to the said [*mortgagor*], at, or immediately before, the execution of these presents, the receipt whereof the said [*mortgagor*] doth hereby acknowledge, and from the same sum, and every part thereof, doth acquit, release, and for ever discharge the said [*mortgagee*], his heirs, executors, administrators, and assigns; They, the said [*mortgagor*] and [*wife*], his wife, *Have*, and each of them *Hath* granted, bargained, sold, and confirmed (*b*), and by these presents *Do*, and each of them *Doth* grant, &c., unto the said [*mortgagee*], his heirs and assigns (*c*), ALL THAT *(describe parcels)*

Testatum.

Grant.

Form of mortgage deed, where accompanied by a fine.

(*b*) Where a fine is levied for the purpose of making a mortgage, or for any other purpose, a simple declaration of the uses of the fine is sufficient to vest the estate in the *cestui que use* (*vide ante*, Vol. 4, p. 181); though it is more usual to make the conusors convey by lease and release, and levy the fine in corroboration of that assurance. In the present case, as the premises are in the occupation of a lessee, a grant is the proper form of conveyance, and no lease for a year is necessary. In the draft, indeed, from which this precedent was taken, the conveyance was made by lease and release, but this is altogether superfluous, for, even if the grant was for any reason void, the fine would operate to convey the property to the uses declared.

To what representatives money payable.

(*c*) Though the legal estate will, under a mortgage in fee, on the death of the mortgagee, vest in his real representatives, the money should be made payable to his executors, administrators, or assigns. If, by the terms of the proviso for redemption, the money be payable to him, his *heirs*, executors, administrators, or assigns, the mortgagor may, on the day named in the proviso, pay either the heir or the personal representative; but, if the

MORTGAGE IN FEE BY HUSBAND AND WIFE.

which said premises are now in the actual occupation of ———, by virtue of a certain indenture of lease, bearing date &c., granted by —— unto ——, for the term of —— years, from the —— day of —— then last, at the yearly rent of £——, payable quarterly; And all houses, &c.; And all the estate, &c.; And all deeds, &c. (*ut ante*, pp. 246, 247); To HAVE AND TO HOLD the said messuage or tenement, lands, and hereditaments, and all and singular other the premises hereinbefore granted, or intended so to be, with their appurtenances, unto the said [*mortgagee*], his heirs and assigns; *To the use of the said* [*mortgagee*], *his heirs and assigns, for ever, subject nevertheless to the proviso or agreement for redemption hereinafter contained* (*d*). And for the considerations aforesaid, he the said [*mortgagor*] doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said [*mortgagee*], his heirs, executors, administrators, and assigns, that they the said [*mortgagor*] and [*wife*], his wife, (she hereby consenting thereto), shall and

Habendum.

To the use of mortgagee.

Covenant by mortgagor, that he and his wife shall levy a fine.

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money be not paid on the day, the election is gone, and the payment must be made to the personal representatives. See Co. Litt. 210. a.; *Thornborough* v. *Baker*, 1 Ch. Cas. 283; *S. C.* 2 Freem. 143, 3 Swanst. 628.

(*d*) If the estate to be vested in the mortgagee is a term only, instead of the words in italics say—

Variation, where the mortgage is for a term.

"*To the use* of him the said [*mortgagee*], his executors, administrators, and assigns, for the term of one thousand years, to be computed from the day of the date of these presents, fully to be complete and ended, without impeachment for any manner of waste, but subject nevertheless to the proviso or condition for redemption hereinafter contained; and from and after the expiration, or sooner determination of the said term, *To such uses*, upon such trusts, for such estate or estates, intents, and purposes, as the said [*mortgagor*] and [*wife*], his wife, shall, at any time or times hereafter, by any deed or deeds to be attested by one witness or more, jointly direct or appoint; and, in default of such direction or appointment, *To the use* of them the said [*mortgagor*] and [*wife*], his wife, their heirs and assigns, for ever," *(or otherwise, as the case may be).*

MORTGAGE IN FEE BY HUSBAND AND WIFE.

will, at the request of the said [*mortgagee*], his heirs, executors, administrators, or assigns, but at the costs and charges of the said [*mortgagor*], as of —— term now last past, or in, or as, and before the end of —— term now next ensuing, acknowledge and levy unto the said [*mortgagee*] and his heirs, before his Majesty's Justices of the Court of Common Pleas, at Westminster, one fine *sur conuzance de droit, come ceo, &c.*, with proclamations, according to the form of the statute in that case made and provided, and the usual course of fines, of the said messuage or tenement, lands, and hereditaments hereinbefore granted, or intended so to be, with their appurtenances, by the names and descriptions of two messuages, two gardens, and four acres of land, with the appurtenances, in ——, or by such other apt, proper, and convenient names, quantities, qualities, and other descriptions as shall be sufficient to comprise the same; (*e*) AND *it is hereby declared and agreed* by and between the said parties, that the fine so as aforesaid or in any other manner levied or to be levied, and every other fine whatsoever, at any time or times heretofore, or to be at any time hereafter acknowledged or levied of and concerning the said messuage or tenement, lands, and hereditaments, or any of them, [either alone or jointly with any other hereditaments], by or between the said parties to these presents, or any of them, [either alone or jointly, and together with any other person or persons whomsoever, or to which they or either of them is or are, or shall or may be parties or privies, or party or privy], shall be and enure, and be deemed and construed to be and enure, [as, to, for, and concerning the said messuage or tenement, lands, and hereditaments hereby granted, or intended so to be, with their rights, members, and appurtenances] (*f*);

Declaration of the uses of the fine.

(*e*) Where the object of the fine is simply to extinguish the wife's dower, the form of the covenant is the same, but she does not join in granting the estate.

Variation, where mortgage is for a term.

(*f*) If the mortgage is for a term, and the other uses, *ut ante*, p. 282, say:—"To the uses, and for the intents and purposes hereinbefore declared concerning the same."

MORTGAGE IN FEE BY HUSBAND AND WIFE.

To THE USE *of the said* [*mortgagee*], *his heirs and assigns, for ever; but subject nevertheless to the proviso or agreement for redemption hereinafter contained, that is to say,* PROVIDED ALWAYS, and it is hereby declared and agreed, by and between the parties to these presents, that, if the said [*mortgagor*] and [*wife*], their appointees, heirs, or assigns, shall pay, or cause to be paid, unto the said [*mortgagee*], his executors, administrators or assigns, the full sum of £——, of lawful money of the United Kingdom, at or in the common dining-hall of Lincoln's Inn, in the county of Middlesex, upon the —— day of ——, which will be in the year of our Lord ——, and in the meantime shall, half-yearly, (that is to say), on the —— day of ——, and the —— day of ——, in every year (the first payment to be made on the —— day of —— next), pay, or cause to be paid, unto the said [*mortgagee*], his executors, administrators, or assigns, interest for the said sum of £——, after the rate of five pounds for one hundred pounds by the year, without any deduction or abatement whatsoever in respect of any taxes, charges, rates, or assessments, or upon account or in respect of any other matter, cause, or thing whatsoever; then, and in that case, immediately after such payment shall be made as aforesaid (*g*), *the said* [*mortgagee*], *his heirs or assigns, shall, at the request and costs of the said* [*mortgagor*] *and* [*wife*], *his wife, their appointees, heirs, or assigns, reconvey and assure the said messuage and tenements, lands, and hereditaments hereby granted, or intended so to be, and every part thereof, with their and every of their appurtenances, free from all charges and incumbrances, to be made or suffered by him, the said* [*mortgagee*], *his heirs or assigns, in the meantime, to the uses following (being the limitations to which it is intended that the equity of redemption in the said hereditaments shall be subjected, as hereinbefore recited), that is to say,* To SUCH USES, *upon such trusts, and for such estate or estates, intents,*

Proviso for redemption.

(*g*) If the mortgage is for a term—

Variation, where mortgage is for a term.

"the said term of one thousand years hereby created shall cease and be absolutely void."

MORTGAGE IN FEE BY HUSBAND AND WIFE.

and purposes, as the said [*mortgagor*] *and* [*wife*], *his wife, shall at any time or times hereafter, by any deed or deeds, to be attested by one witness or more, jointly direct or appoint; and, in default of such direction or appointment,* To THE USE *of them the said* [*mortgagor*] *and* [*wife*], *their heirs and assigns, for ever, (or otherwise, as the case may be), and to or for no other use, intent, or purpose whatsoever;*

Covenant by the mortgagor.

AND the said [*mortgagor*] doth hereby, for himself, his heirs, executors, and administrators, covenant and agree

To pay monies.

with the said [*mortgagee*], his executors, administrators, and assigns, that he the said [*mortgagor*], his heirs, executors, or administrators, will pay or cause to be paid unto the said [*mortgagee*], his executors, administrators, or assigns, the said principal sum of £——, and the interest thereof at the rate aforesaid, at the several times hereinbefore appointed for payment thereof, without any deduction or abatement on any account whatsoever, according to the true intent and meaning of these presents; *And also*, that he the said [*mortgagor*] and [*wife*], his wife, or one of them, now have or hath in themselves, himself, or herself, good right, and lawful and absolute authority, by these presents and the fine hereinbefore covenanted to be levied, to grant and assure the said messuage or tenement, lands, and hereditaments hereby granted, or intended so to be, [and every part and parcel of the same, with their and every of their appurtenances], unto and to the use of the said [*mortgagee*], *his heirs, and assigns* (*h*), in manner aforesaid, according to the true intent and meaning of these presents; *And also*, that immediately after default shall be made in payment of all or any part of the said sum of £——, and interest, contrary to the true intent and meaning of the proviso or agreement for redemption hereinbefore contained, it shall be lawful for the said [*mortgagee*], his *heirs, or assigns* (*i*), to enter into and upon, and hold and enjoy the said messuage or tenement, lands, and hereditaments hereby granted, or intended so

That he and his wife have power to grant.

For quiet enjoyment after default.

Variation, where mortgage is for a term.

(*h*) *Or*, "his executors, administrators, or assigns, for all the residue of the said term of one thousand years, hereinbefore limited."

(*i*) *Or*, "his executors, administrators, or assigns."

to be, [and every part and parcel of the same, with their and every of their appurtenances], and to receive and take the rents and profits thereof, according to the true intent and meaning of these presents, without any interruption or denial of, from, or by any person or persons whomsoever; And that free and clear [and freely, and clearly, and absolutely released and discharged, or otherwise by him the said [*mortgagor*], his heirs, executors, or administrators, at his or their own costs and charges, saved harmless and kept indemnified] from and against all and all manner of estates, titles, liens, charges, and incumbrances whatsoever, except the said indenture of lease hereinbefore referred to. *And moreover,* that he the said [*mortgagor*] and [*wife*], his wife, respectively, and the heirs of the said [*wife*], and all persons whosoever lawfully or equitably and rightfully claiming or to claim any estate, right, title, trust, charge, or interest at law or in equity, of, in, to, out of, or upon the said hereditaments, or any part thereof, except the person or persons entitled to the term created by the said indenture of lease hereinbefore referred to, shall and will, from time to time, and at all times hereafter, upon every reasonable request of the said [*mortgagee*], his executors, administrators, or assigns, but at the costs and charges of the said [*mortgagor*], his heirs, executors, or administrators, make, do, acknowledge, levy, suffer, and execute, or procure to be made, done, acknowledged, levied, suffered, and executed, all such further and other lawful and reasonable acts, deeds, conveyances, and assurances in the law whatsoever, for more effectually or satisfactorily granting and confirming, or otherwise assuring the said messuage or tenement, lands, and hereditaments hereby granted, or intended so to be, [and every part and parcel of the same, with their and every of their appurtenances], unto and to the use of the said [*mortgagee*], *his heirs and assigns, for ever* (*k*), according to the

MORTGAGE IN FEE BY HUSBAND AND WIFE.

Free from incumbrances.

For further assurance.

(*k*) *Or,* "unto the said [*mortgagee*], his executors, administrators, or assigns, for all the residue which shall be then unexpired of the said term of one thousand years, hereinbefore limited."

Variation, where mortgage is for a term.

MORTGAGE IN FEE BY HUSBAND AND WIFE.

true intent and meaning of these presents, as by the said [*mortgagee*], his executors, administrators, or assigns, or his or their counsel in the law shall be reasonably advised and required (*l*). In witness, &c.

The wife is the husband's creditor, in respect of incumbrances created for his benefit.

(*l*) When the husband and wife pledge the wife's estate for money advanced to him, (and, in the absence of evidence to the contrary, the loan will be presumed to be for him), he will in equity be regarded as the principal debtor, and his assets will be liable to exonerate the wife's estate from the charge; *Pocock* v. *Lee*, 2 Vern. 604; *Tate* v. *Austin*, 2 Vern. 689; *S. C.* 1 P. W. 264; *Bagot* v. *Oughton*, 1b. 347; *Parteriche* v. *Powlet*, 2 Atk. 384, Amb. 150; *Astley* v. Earl of *Tankerville*, 3 B. C. C. 545; Earl of *Kinnoul* v. *Money*, 3 Swanst. 203, n.; subject, however, to the claims of his other creditors. *Tate* v. *Austin*, 2 Vern. 689.

But, if the money be borrowed for the use of the wife, or for the purpose of discharging debts owing by the wife, while sole, the mortgage will be considered as the debt of the estate, and not of the husband. *Lewis* v. *Nangle*, Amb. 150; 2 P. W. 664, Cox's n.; *S. C.* 1 Cox, 240; and the circumstance of the husband having, by covenant or otherwise, made himself liable to the mortgagee, will not vary the rule.

So, where the husband and wife raise a sum of money to pay off a mortgage, which belonged to the estate when it came to the wife, his bond or covenant will not have the effect of making the debt his own. *Bagot* v. *Oughton*, 1 P. W. 347.

It is the application of the money which determines whether and to what extent the obligation to exonerate the estate attaches to the husband. If it appear that it was borrowed, partly for the husband, and partly to pay debts and legacies owing and bequeathed by the lady's father, the husband will be liable for the former portion of it, and for that alone. Earl of *Kinnoul* v. *Money*, 3 Swanst. 202, n. The case of *Lewis* v. *Nangle*, 2 P. W. 664, Cox's n., which has been considered as supporting a contrary doctrine, was treated by Lord *Camden* as standing upon special grounds.

Where it is intended that the husband's assets shall not be liable to exonerate the wife's estate from an incumbrance created for his benefit, the following declaration should be inserted:—

Declaration, that husband's assets shall not be liable to exonerate wife's estate.

" And it is hereby agreed and declared by and between the said [*mortgagor*] and [*wife*], his wife, that, as between the said [*mortgagor*], his heirs, executors, and administrators, and the said [*wife*], her heirs, and assigns, the said hereditaments and premises hereby granted, &c., shall

solely stand and be charged and chargeable with, and liable to, the said principal sum of £——, and interest, hereby intended to be secured; and that the said [*mortgagor*], for whose use the said sum of £—— has been borrowed as aforesaid, or his heirs, executors, or administrators, shall not be bound or compellable to exonerate the said hereditaments and premises from the same sum and interest, or any part thereof respectively, any rule of law or equity to the contrary notwithstanding."

MORTGAGE IN FEE BY HUSBAND AND WIFE.

MORTGAGE *by* RELEASE *in* FEE *to* BANKERS, *for securing* FLOATING BALANCE *of* ACCOUNT CURRENT. (VARIATIONS *where the Security extends to the* PARTNERS *for the* TIME BEING *of the* BANKING-HOUSE (*a*); *Also where it is limited to a* DEFINITE SUM.

BANKERS' SECURITY FOR FLOATING BALANCE.

THIS INDENTURE, made the —— day of ——, BETWEEN [*mortgagor*], of &c., of the one part; and [*mort-* Parties.

(*a*) Some learned persons are of opinion that the late Stamp Act precludes the possibility of including under one stamp a security which is to embrace sums of money to be advanced by the varying members of a banking or other firm; the case being, it is thought, within the terms of the clause that imposes several stamps where the mortgage is made "as a security for the payment or transfer to *different* persons of separate and distinct sums of money or shares in any of the stocks or funds," and not one stamp on the aggregate amount; and it is therefore contended, that advances to be made by a new firm (and every secession or addition of a partner in the house, clearly constitutes it a new firm,) require a separate stamp as a distinct mortgage: but, whatever weight there may be in this reasoning, it is probable that the Courts would consider a banking or mercantile firm, however its members may have changed, as one and the same creditor, for the purpose in question, since, in almost every case that has arisen upon the Stamp laws, (with one signal exception indeed, see *Attorney General* v. *Jones*, 3 Price, 368, stated Jarm. Pow. Dev. 11),

Whether a security to the members for the time being of a banking-house can be included in one stamp as an entire debt.

BANKERS' SECURITY FOR FLOATING BALANCE.

gagees] (*b*), of &c., bankers and co-partners, carrying on business under the stile or firm of ——, of the other part. WHEREAS the said [*mortgagor*] hath opened an account with the banking-house of the [*mortgagees*]; AND it hath been agreed, in order to secure the sum and sums of money which shall from time to time become due from him on the balance of such account (*c*), that he shall execute a conveyance to the said [*mortgagees*] of the fee-simple and inheritance of the hereditaments hereinafter described, upon the trusts, and for the intents and purposes hereinafter expressed concerning the same. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and for effectually securing unto the said [*mortgagees*], and the survivors and survivor

Recital of mortgagor having opened a banking account with mortgagees, and agreement for security.

Testatum.

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the strongest disposition has been manifested to prevent these laws from intrenching upon convenience and the regular course of transactions, farther than their primary object, the imposition of a public tax, requires; and, in the case under discussion, the inconvenience would be very great, if securities could not be framed in the manner suggested, for it would be necessary for a banking-house to have a new security from its customers at every change in the firm.

In some cases, indeed, a question may arise as to the identity of the banking or mercantile house to which the security is made; as, where the partners divide and establish several firms, or where the whole of the partners of the old firm retire, transferring the partnership property and books to an entirely new class of persons, who open a banking-house under a different name, and in a different place; but the circumstance, that, in these cases, difficulties might arise in saying what is or is not the continuing firm of the banking-house to which the security is made, cannot constitute a ground of objection to the security, where events have not created an uncertainty of this kind.

(*b*) The bankers are here called "mortgagees," for the sake of convenience, though it will be perceived that the present security is not properly a mortgage, but a conveyance, with an immediate trust for sale, subject to a covenant not to exercise it until after notice. (See observations on securities of the kind, *ante*, p. 234).

(*c*) If the security is to be limited to a given sum, in order to avoid the 25*l.* stamp, add—

Variation, where security is limited to a definite sum.

"subject to the limitation hereinafter mentioned."

of them, his executors, or administrators (*d*), or their or his assigns (*e*), the sum and sums of money which now is and are, or at any time, and from time to time hereafter, shall or may be due or owing to them or him on the balance of the account current of the said [*mortgagor*], as hereinafter mentioned (*f*); *And also* in consideration of ten shillings of lawful money of Great Britain, to the said [*mortgagor*] paid by the said [*mortgagees*], immediately before the execution of these presents (the receipt whereof is hereby acknowledged), the said [*mortgagor*] *Hath* granted, bargained, sold, released, and confirmed, and by these presents *Doth* &c. unto the said [*mortgagees*], their heirs and assigns, for ever, (in the actual possession &c. *ut ante*, p. 246), *(Describe parcels, adding general words); And* the reversion, &c.; AND all the estate, &c.; *And* all deeds, &c.; TO HAVE AND TO HOLD the said ——, hereinbefore described, and hereby released or otherwise assured, or intended so to be, and every part and parcel of the same, with the appurtenances, unto the said [*mortgagees*], their heirs and assigns, TO THE ONLY PROPER USE AND BEHOOF of the said [*mortgagees*], their heirs and assigns, for ever, *Upon the trusts nevertheless,* and for the intents and purposes hereinafter expressed and declared concerning the same, that is to say, UPON TRUST, that they the said [*mortgagees*], or the survivors or survivor of them, or his heirs, or their or his assigns, of their or his own proper authority, without any further consent or concurrence of the said [*mortgagor*], his heirs, or assigns, [and notwithstanding the said [*mortgagor*], his heirs, or assigns, shall be under any disability], do and shall at any time or times hereafter, when

BANKERS' SECURITY FOR FLOATING BALANCE.

Mortgagor grants to mortgagees.

Habendum.

Upon trust to sell.

(*d*) If it is intended that the security shall extend to the partners for the time being in the banking-house, add—

Variation, where security extends to the firm of the banking-house for the time being.

" or their or his partner or partners, or other the person or persons for the time being constituting the firm of the said banking-house."

(*e*) If the security is to be limited to a given amount, add—

" but subject to the limitation hereinafter expressed."

(*f*) " subject to the limitation hereinafter expressed."

BANKERS' SECURITY FOR FLOATING BALANCE.

they or he in their or his discretion shall think proper, [without prejudice however to the right of action on the part of the said [*mortgagor*], his heirs, executors, administrators, or assigns, under the covenant or covenants of the said [*mortgagees*] hereinafter contained], make sale of and absolutely dispose of the said ——— hereby released or otherwise assured, or intended so to be, or any part or parts of the same, either together or in parcels, and either by public auction or private contract, or partly by public auction and partly by private contract, with liberty, if it shall be deemed expedient so to do, to buy in the said hereditaments to be offered for sale at any auction or auctions, or any part thereof, and sell the same at any future auction or auctions, or by private contract, and convey the same hereditaments when sold, to the person or persons who shall agree to become the purchaser or purchasers thereof; AND UPON THIS FURTHER TRUST, that they the said [*mortgagees*], or the survivors or survivor of them, or his heirs, or their or his assigns, do and shall, by, with, and out of the clear rents, issues, and profits (if any) of the said —— hereby released or otherwise assured, or intended so to be, which shall be received by them or him respectively, and also the money which shall arise by and from such sale or sales respectively, in the first place, deduct and retain for themselves and himself respectively, the costs, charges, and expenses of and attending the said sale or sales, and the money which he and they respectively shall disburse for the taxes and repairs of the said premises (*g*), or in or about any suit or suits at law or in equity, for obtaining the possession of the said premises, or any of them, or in enforcing the performance of any contract or contracts with any person or persons who shall agree to become the purchaser or purchasers of the said premises, or any of them, or otherwise in carrying the trusts hereinbefore contained into execution; *And*, in the next place, do and shall retain or pay unto or for the said [*mortgagees*], or the survivors or sur-

By auction or private contract, with liberty to buy in, &c.

Further trust out of rents till sale and out of purchase-money to pay expenses.

And in the next place retain the

(*g*) And if the premises consist of buildings, add—

"and the insurance of the buildings thereof from loss or damage by fire."

vivor of them, his executors or administrators (*h*), or their or his assigns, all and every sum and sums of money which shall be then due or owing from the said [*mortgagor*], on the balance of his account current with the said [*mortgagees*], or the survivors or survivor of them, his executors or administrators (*h*), or their or his assigns, either for money paid or advanced, or to be paid or advanced by them or any of them unto the said [*mortgagor*], or at his request, or which shall be secured by any bond, or bill of exchange drawn or indorsed by the said [*mortgagor*], or by any promissory note, or other contract whatsoever, with interest for the same respectively from the several times at which they respectively shall be advanced, or at which the said bonds, bills, notes or other contracts respectively shall become due, and thenceforth until payment thereof respectively, after the rate of *5l. per cent. per annum*, unless any agreement in that particular shall have been made to the contrary, and in case of such agreement, then in the manner and after the rate of interest which shall have been stipulated to be paid by such bond, bill of exchange, promissory note, or other contract respectively, with commission and other usual bankers' charges (*i*); AND UPON THIS FURTHER TRUST, that they the said [*mortgagees*], or the survivors or survivor of them, or his heirs, or their or his assigns, after raising and retaining or receiving all and every the sum and sums of money, interest, bankers' charges,

BANKERS' SECURITY FOR FLOATING BALANCE.

money owing on the balance of such banking account, with interest, &c.

Further trust to pay the overplus to mortgagor, his heirs, &c.

(*h*) "And their or his partner or partners, or other the person or persons for the time being constituting the firm of the said banking-house."

(*i*) Add, if the security is to be limited to a certain sum—

"Provided nevertheless that the principal sum or sums of money to be ultimately recoverable by means of the security hereby made, *(adding, if there is a provision for fire-insurance* 'exclusively of any sum or sums to be paid or advanced for the insurance of the said buildings from loss or damage by fire'), shall not exceed the sum of £——."

Variation, where security is to be limited to a definite sum.

In a late case, where the bond was for the payment of "all and every sum and sums of money which the plaintiffs, or the survivor or survivors

Question whether bond was

BANKERS' SECURITY FOR FLOATING BALANCE.

costs, damages, and expenses aforesaid, do and shall pay the residue or surplus (if any) of the money which

to be stamped as intended to secure a definite or indefinite sum.

of them, or any partner or partners in their said banking business, should, within ten years from the date thereof, advance or pay, or be liable to advance or pay for or on account of their accepting, indorsing, discounting, paying, or satisfying any bill or bills of exchange, drafts, notes, orders, or other engagements whatsoever, which T. should from time to time draw or cause to be drawn upon them, or make payable at their said banking-house, and also all and every other sum and sums of money which the plaintiffs, or the survivor or survivors of them, or any partner in their banking business, should, within the period aforesaid, otherwise lay out or advance, or become in anywise liable to pay on the credit of the said T., or on his account, to any person or persons whomsoever; and also all such charges and allowances for advancing and paying such bill or bills, drafts, notes, acceptances, advances, payments, engagements, and accommodations, *not exceeding the sum of* 5000*l*. *in the whole*, together with interest for such sum and sums of money as they or any of them should at any time within the period aforesaid be in advance on account of the said T., as is usually charged by bankers in such and the like cases." The bond was stamped with a 9*l*. stamp. T., subsequently to the execution of the bond, paid to the bankers sums considerably exceeding 5000*l*., but on the balance a sum was due to them, for which the present action was brought. It was contended that the bond was on a wrong stamp, as, if it were intended to extend to successive advances of 5000*l*. each, or to floating balances during the whole ten years, it should have had a 25*l*. stamp, the 9*l*. stamp being only applicable to a security for a certain sum of money not exceeding 5000*l*.; but the Court was of opinion that the bond was properly stamped, *the money secured thereby, or to be ultimately recoverable thereupon*, being limited to 5000*l*. *Williams* v. *Rawlinson*, 10 J. B. Moore, 362.

Where a banker's security is limited to a definite sum, care should be taken that such sum includes the charges for commission, otherwise it should seem the instrument will be liable to the maximum stamp. Thus, where the condition of a bond recited that A. and B. had opened an account with the obligees as bankers, who had agreed to discount bills of exchange and otherwise pay in advance for them any sum or sums of money *not exceeding the sum of* 1000*l*. in the whole; A. and B. entering into the bond together with C., who had agreed to become security with A. and B. for the due performance of the condition thereunder written. The terms of the condition were, that, if the obligors should pay to the obligees such sums of money as they should advance or be liable to pay on the account of the obligors, *together with such lawful charges and allowances for paying bills, &c., as are usually charged by bankers*, with interest on the

shall then remain in his or their hands unapplied to any of the purposes aforesaid, unto the said [*mortgagor*], his heirs, executors, administrators, or assigns (*k*); And also do and shall convey and assure unto and to the use of the said [*mortgagor*], his heirs or assigns, or unto whom he or they shall appoint, the fee-simple and inheritance of such and so many of the said ——— hereby released or otherwise assured, or intended so to be, as shall then remain unsold, freed and discharged of and from all estates, charges, and incumbrances, to be created by the said [*mortgagees*], or any or either of them, their or any or either of their heirs, executors, administrators, or assigns, in the meantime; And upon, to, or for no other trust, end, intent, or purpose whatsoever. *And* it is hereby declared and agreed by and between the parties to these presents, that every purchaser of the said —— hereby released or otherwise assured, or intended so to be, or any part thereof, who

BANKERS' SECURITY FOR FLOATING BALANCE.

And to reconvey the premises unsold for any of the purposes aforesaid, to mortgagor, his heirs, and assigns.

Declaration that mortgagees' receipts shall discharge purchasers.

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sums advanced, then the bond to be void. The bond was stamped as a security for 1000*l.*; and this stamp was held to be insufficient, on the ground that it extended to the banker's charges for commission ultra the 1000*l.* *Dickson* v. *Cass*, 1 Barn. & Ad. 343.

(*k*) Under a trust of this nature, if the property remain unconverted at the decease of the mortgagor, it will go to his heir or devisee, as real estate; but, if it be actually converted in his lifetime, the produce of the sale will belong to his executors or administrators as personalty. *Wright* v. *Rose*, 2 Sim. & Stu. 323. But under an immediate and absolute trust for sale, the property becomes impressed with the character of personalty instantly. *Van* v. *Barnett*, 19 Ves. 102.

Destination of property in regard to the representative of the mortgagor.

Sometimes, to prevent mistake, the rights of the parties upon this point are thus explicitly declared—

"unto the said [*mortgagor*] or his assigns, or in case of his or their death, then, as to such part or parts of the said surplus money as shall be received or arise from contracts for sale made in his or their lifetime, do and shall pay the same unto the personal representatives of the said [*mortgagor*] or of his assigns; and, as to such part or parts of the said surplus money as shall not arise from sales or contracts for sale made in the lifetime of the said [*mortgagor*] or of his assigns, do and shall pay the same unto the real representatives of the said [*mortgagor*], or of his assigns."

BANKERS' SECURITY FOR FLOATING BALANCE.

shall pay his or her purchase money into the hands of the said [*mortgagees*], or the survivors or survivor of them, or his heirs, or their or his assigns, shall be discharged from all responsibility in respect of the application thereof; *And further*, that the purchaser or respective purchasers of the said hereditaments shall not be obliged to inquire whether any such previous notice of sale or sales as hereinafter is mentioned, hath been given to the said [*mortgagor*], his heirs, executors, administrators, or assigns, or whether the sale or sales to be made as aforesaid shall or may be necessary or proper for all or any of the purposes hereinbefore expressed, nor shall be affected by express knowledge, that no such notice hath been given to the said [*mortgagor*], his heirs, executors, administrators, or assigns, or that such sale or sales is or are unnecessary and improper; [And that every sale which shall be made, and contract for a sale which shall be entered into, and every conveyance which shall be executed by the said [*mortgagees*], or the survivors or survivor of them, or his heirs, or their or his assigns, shall be binding and conclusive on the said [*mortgagor*], his heirs and assigns, to all intents and purposes whatsoever, as fully and effectually as if such sale had been made and contract entered into, and conveyance executed by or with the concurrence of the said [*mortgagor*], his heirs or assigns (*l*)], *And* [by way of agreement and not of condition, and so only as to charge the said [*mortgagees*], their heirs, executors, and administrators, with damages for the breach or non-performance of their covenant hereinafter contained, and not to affect the person or persons who shall become a purchaser or purchasers under the trusts hereinbefore declared, although he, she, or they have ex-

Purchasers not obliged to inquire into the propriety of sales.

All sales, contracts, &c., to be binding on mortgagor.

Covenant by mortgagees not to take possession or sell without three months' previous notice.

Mortgagor's concurrence in sale not necessary.

(*l*) This clause imparts no additional validity to the sale, and may therefore be, as it frequently is, omitted. The rule is now well settled, that a purchaser is bound to accept a title from a mortgagee empowered to sell, without the concurrence of the mortgagor; and the circumstance of his having covenanted to concur in the sale or conveyance, is immaterial. *Clay* v. *Sharpe*, March, 1802, cit. 18 Ves. 346; *Corder* v. *Morgan*, 18 Ves. 344, stated *ante*, Vol. 1, pp. 570, 571. It is extraordinary that at this day the objection should ever be heard of.

press knowledge that no such notice has been given or default made as hereinafter mentioned], the said [*mortgagees*] do by these presents jointly for themselves, their heirs, executors, and administrators, and each of them severally doth for himself, his heirs, executors, and administrators, covenant with the said [*mortgagor*], his heirs, and assigns, that no sale or sales of the said ——— hereby released, or otherwise assured, or intended so to be, or of any part of the same, shall or may be made by the said [*mortgagees*], or the survivors or survivor of them, or his heirs, or their or his assigns, or any means taken by them or him for obtaining the possession, or entering into the receipt of the rents and profits of the same premises, or of any of them, before and until such notice as hereinafter provided shall have been given to the said [*mortgagor*], his executors, administrators, or assigns, demanding payment of the sum or sums of money which then or at the expiration of three calendar months from the time of such notice shall be due and owing to the said [*mortgagees*], or the survivors or survivor of them, his executors or administrators (*m*), or their or his assigns, on the balance of account as aforesaid, and the said [*mortgagor*], his heirs, executors, administrators, and assigns, shall have made default in payment of the same monies, or some part thereof, at the end of the said three calendar months; *And further*, that they the said [*mortgagees*], and the survivors or survivor of them, his executors or administrators (*m*), or their or his assigns, shall or will at any time hereafter, when thereunto requested by the said [*mortgagor*], his heirs, executors, administrators, or assigns, and within ten days from the time of such request, make out a true, just, and particular account of all the sum and sums of money which shall be due and owing from him or them, on the balance of his or their account current with the said [*mortgagees*], or the survivors or survivor of them, his executors or administrators (*m*), or their or his assigns, and deliver the same account to the said [*mortgagor*], his heirs, executors, administrators, or assigns, when he or they shall require the delivery of the same; *And* that

BANKERS' SECURITY FOR FLOATING BALANCE.

To render an account on request, and, on payment of balance, to reconvey.

(*m*) "or their or his partner" &c. Variation.

BANKERS' SECURITY FOR FLOATING BALANCE.

on payment or tender by the said [*mortgagor*], his heirs, executors, administrators, or assigns, to the said [*mortgagees*], or the survivors or survivor of them, his executors or administrators (*n*), or their or his assigns, of the same sum or sums of money, shall and will, on the request and at the costs and charges of the said [*mortgagor*], his heirs or assigns, reconvey all and every the said —— hereby released or otherwise assured, or intended so to be, or such and so many of them as shall then remain unsold under the trusts hereinbefore contained, either unto and to the use of the said [*mortgagor*], his heirs or assigns, or unto whom and in such manner as he or they shall direct or appoint. And the said [*mortgagor*] doth, by these presents, for himself, his heirs, executors, and administrators, covenant and agree with the said [*mortgagees*], their executors and administrators, that he the said [*mortgagor*], his heirs, executors, or administrators, shall and will, from time to time, immediately on demand, or within three calendar months after notice shall have been given to him or them as hereinafter provided, pay or cause to be paid to the said [*mortgagees*], or the survivors or survivor of them, his executors or administrators (*n*), or their or his assigns, all and every the sum and sums of money which shall be due and owing from the said [*mortgagor*], his heirs, executors, or administrators, to the said [*mortgagees*], or the survivors or survivor of them, his executors or administrators (*n*), or their or his assigns (*o*), on the balance of the account current of the said [*mortgagor*] with them or him as hereinbefore mentioned; *And also*, all costs, charges, and payments which shall be incurred, sustained, or made by the said [*mortgagees*], or either of them, their or either of their heirs, executors, or administrators, in the execution of the trusts hereby reposed in him and them, in recovering or

Covenant by mortgagor to pay the balance of account and expenses on demand or expiration of notice.

Variation.

(*n*) "or their or his partner or partners, or other the person or persons for the time being constituting the firm of the said banking-house."

(*o*) "subject nevertheless to the limitation hereinbefore expressed."

BANKERS' SECURITY FOR FLOATING BALANCE.

enforcing the payment of the money which, from time to time, shall be due and owing from him and them upon the balance of such account as aforesaid, or otherwise, upon this present security: PROVIDED ALWAYS, and it is hereby declared and agreed, that the notice hereinbefore required to be given by the said [*mortgagees*], or the survivors or survivor of them, or his heirs, or their or his assigns, shall or may be made by letter, or other writing, signed by them or him, or any person or persons on their or his behalf, addressed to the said [*mortgagor*], his heirs, executors, or administrators, or any of them, and delivered to him or them, or any of them, or left at his or their, or any of their usual or last known place or places of abode in England, or in case he or they shall not be then resident in England, or the place of his or their abode shall not be known to the said [*mortgagees*], or the survivors or survivor of them, or his heirs, or their or his assigns, then by advertisement signed as aforesaid, and published in the London Gazette (such letter, notice, or advertisement stating the amount of the balance which will become due at the expiration of three calendar months from the date thereof, and requiring payment of such balance at the expiration of the said period), and the same shall be and be deemed valid and sufficient for all the purposes hereinbefore expressed. PROVIDED ALSO, and the said [*mortgagees*] hereby severally declare, that the money advanced or to be advanced to the said [*mortgagor*] as aforesaid, has been or is to be advanced out of money belonging to them (*p*), on their partnership account; and that in case any or either of them shall die in the lifetime of the other or others of them, then the whole of the sum and sums of money then owing on this security shall be payable and paid to the survivors or survivor of them the said [*mortgagees*], or the executors or administrators of the survivor of them (*p*), or their or his assigns, as part of their or his partnership effects, and without the concurrence of the executors, administrators, or assigns of such one or two of them the said [*mortgagees*] as shall have first departed

Declaration as to the mode and form of giving notice.

Declaration, that money advanced is advanced on a partnership account, and the concurrence of the executors or administrators of deceased partners shall not be necessary.

(*p*) "or their or his partner" &c.

BANKERS' SECURITY FOR FLOATING BALANCE.

this life, any rule of law or equity to the contrary notwithstanding. PROVIDED ALSO, and it is hereby declared and agreed, by and between the parties to these presents, that the said [*mortgagor*], his heirs or assigns, shall not have or be entitled to any allowance, either by way of interest or otherwise, for the money (if any) which at any time or times hereafter shall be owing to him or them on the balance of his or their account with the said [*mortgagees*], or the survivors or survivor of them, his executors or administrators (*q*), unless the said [*mortgagor*], his heirs or assigns, shall have obtained and taken from the said [*mortgagees*], or the survivors or survivor of them, his executors or administrators (*q*), an interest-note for the sum or sums of money which is or are to carry interest, and in that case only from the time of taking such interest-note, and after the rate of interest which shall be expressed therein. *(Covenants for title: viz. for seisin — right to grant — quiet enjoyment — free from incumbrances, and for further assurance).* IN WITNESS, &c.

Agreement, that mortgagor shall not be entitled to interest without an interest-note.

Variation.

(*q*) "or their or his partner or partners, &c."

How far bankers' security is affected by alteration in the firm.

Where a security is to extend to the members for the time being of a firm, the intention should be explicitly declared. In *Ex parte Watson*, 19 Ves. 459, Lord *Eldon* seems to have been of opinion, that a mortgage to A., B., and C. (bankers), or the survivor of them, to secure the payment of all sums of money then due, or thereafter to become due, did not extend to advances made by the house, after another partner had been taken in. See *Ex parte Marsh*, 2 Rose, 239.

Questions of this nature have generally arisen on securities given by sureties. In *Weston* v. *Barton*, 4 Taunt. 673, a bond was given to five persons, bankers, to secure all sums of money which they, *or any of them*, should advance to or on the account of A. and B., and it was held that this did not extend to sums advanced after the decease of one of the obligees by the four surviving partners. The words "any of them," it was said, meant any or either of them *acting on behalf of the whole*. *Vide* on this point numerous cases cited *ante*, Vol. 3, p. 235, *& seq.*

ASSIGNMENT *of a* LEASEHOLD MESSUAGE *by way of* MORTGAGE.—COVENANT *to keep on foot* POLICY *of* FIRE INSURANCE, PAY RENT, *and* PERFORM COVENANTS *in* LEASE, *&c.* ASSIGNMENT OF LEASEHOLD MESSUAGE, &c.

THIS INDENTURE, made &c., BETWEEN [*mortgagor*], of &c., of the one part; and [*mortgagee*], of &c., of the other part. WHEREAS, by indenture of lease, bearing date on or about the —— day of ——, and made between [*lessor*], of the one part, and the said [*mortgagor*], of the other part, the said [*lessor*] did demise, grant, and to farm let, unto the said [*mortgagor*], his executors, administrators, and assigns, *(describe parcels)*, together with all appurtenances whatsoever, to the said premises belonging or in any ways appertaining; TO HOLD the same unto the said [*mortgagor*], his executors, administrators, and assigns, from the feast day of the Annunciation of the blessed Virgin Mary then next, for the term of forty years from thence next ensuing and fully to be complete and ended, at and under the yearly rent of £——, payable quarterly in manner therein mentioned; and subject to the several covenants and agreements therein contained, on the part of the said [*lessee*], his executors, administrators, and assigns, to be performed (*a*). AND WHEREAS the said

Parties.

Recital of lease.

Of agreement for loan.

(*a*) If the lease was not granted to the mortgagor, but has become his property, after several mesne assignments, recite lease accordingly, and add—

"AND WHEREAS the said piece or parcel of ground, &c., and premises, comprised in the said recited indenture of lease, have, by virtue of certain mesne assignments, or by other means effectual in the law, become absolutely vested in the said [*mortgagor*], for all the residue of the term thereby granted."

Reference to mesne assignments.

ASSIGNMENT OF LEASEHOLD MESSUAGE, &c.

[*mortgagor*] hath requested the said [*mortgagee*] to lend him the sum of £——, which the said [*mortgagee*] hath agreed to do, on having the repayment thereof, with interest, secured by an assignment by way of mortgage of the said premises comprised in the said indenture of lease as hereinafter expressed. NOW, THEREFORE, THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the said sum of £——, of lawful money of the United Kingdom, to the said [*mortgagor*] lent, advanced, and paid by the said [*mortgagee*], at or before the sealing and delivery of these presents, the receipt of which said sum of £——, he the said [*mortgagor*] doth hereby acknowledge, and from the same and every part thereof doth for ever discharge the said [*mortgagee*], his heirs, executors, and administrators, he the said [*mortgagor*] *Hath* bargained, sold, assigned, transferred, and set over, and by these presents *Doth* &c., unto the said [*mortgagee*], his executors, administrators, and assigns, ALL THAT the said piece or parcel of ground, with the messuage or tenement and premises erected and built thereon, in the said recited indenture of lease and hereinbefore particularly described, and all and every the rights, members, and appurtenances thereunto belonging, and all and singular other the premises comprised in and demised by the said indenture of lease; *And also*, all the estate, right, title, interest, term and terms for years yet to come and unexpired, use, trust, property, claim, and demand whatsoever, both at law and in equity, of him the said [*mortgagor*], of, in, or out of the same, and every or any part thereof; Together with the said indenture of lease, and all benefit and advantage of the same: TO HAVE AND TO HOLD the said piece or parcel of ground, messuage or tenement, and all and singular other the premises hereby assigned, or intended so to be, unto the said [*mortgagee*], his executors, administrators, and assigns, henceforth for all the residue now to come and unexpired of the said term of forty years granted by the said recited indenture of lease, and for all other the estate, term, and interest of the said [*mortgagor*] therein (*b*); PROVID-

Testatum.

Consideration.

Mortgagor assigns to mortgagee.

Parcels.

All the estate.

Habendum.

(*b*) It is always prudent in assigning leaseholds, to insert words to this

ED ALWAYS, and upon condition nevertheless, that if the said [*mortgagor*], his executors, or administrators, or assigns, shall pay or cause to be paid unto the said [*mortgagee*], his executors, administrators, or assigns, at or in the common dining hall of the Middle Temple, in the city of London, the sum of £——, of lawful money aforesaid, together with interest for the same after the rate of five pounds by the year, for every one hundred pounds, at or on the —— day of —— next ensuing, without any deduction or abatement for or on account of taxes, or any other matter, cause, or thing whatsoever; and shall in the meantime perform the several covenants herein contained on the part of him the said [*mortgagor*], his executors, administrators, or assigns, to be performed, then and from thenceforth this present indenture, and the assignment hereby made, shall cease, determine, and be absolutely void to all intents and purposes whatsoever; AND the said [*mortgagor*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*mortgagee*], his executors, administrators, and assigns, that he the said [*mortgagor*], his heirs, executors, or administrators, will duly pay or cause to be paid unto the said [*mortgagee*], his executors, administrators, or assigns, the said sum of £——, together with the interest for the same, at the time and in manner hereinbefore appointed for that purpose; *And also*, that the said recited indenture of lease hereby assigned is, at the time of the sealing and delivery thereof, a good, sufficient, and subsisting lease, valid in the law, for all the residue now unexpired of the said term of forty years thereby granted, and is in no way forfeited, surrendered, determined, or otherwise become void or voidable; And that the rent thereby reserved, and the covenants, conditions, and agreements therein contained, on the part of the said [*mortgagor*] (*c*), his executors, administrators, or assigns, to be performed, have been duly paid and performed, up to the day of the date of these presents; *And that* he the said [*mortgagor*] now hath in himself good

ASSIGNMENT OF LEASEHOLD MESSUAGE, &c.

Proviso for redemption.

Covenant by mortgagor to pay principal and interest monies.

That the lease is valid.

That he has good right to assign.

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effect, to prevent any question as to the operation of the assignment, where the lease is misrecited.

(*c*) Or other person, being the lessee.

ASSIGNMENT OF LEASEHOLD MESSUAGE, &c.

right, full power, and authority to assign the same and all other the premises hereby assigned unto the said [*mortgagee*], his executors, administrators, and assigns, in manner aforesaid; *And also*, that in case default shall be made in the payment of the said sum of £——, and interest, or any part thereof, at the time and in manner hereinbefore mentioned, then and from thenceforth it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, into all or any part of the said premises hereby assigned to enter, and the same peaceably and quietly to hold and enjoy, for all the residue which shall be then unexpired of the said term of forty years, and the rents and profits thereof to receive for his and their own use and benefit, without any interruption or demand whatsoever of or by the said [*mortgagor*], his executors, administrators, or assigns, or any other person or persons whomsoever; *And that* free and clear, and freely and clearly acquitted, exonerated, and discharged, or otherwise by the said [*mortgagor*], his heirs, executors, or administrators, well and sufficiently saved harmless and kept indemnified, of and from all other and former grants, bargains, sales, leases, mortgages, assignments, estates, titles, and incumbrances whatsoever; *And also*, that the said [*mortgagor*], his executors and administrators, and all other persons having or lawfully claiming any estate, right, title, or interest, of, in, to, or out of the said premises hereby assigned, or any part thereof, shall and will, at any time hereafter, so long as the said sum of £——, and interest, or any part thereof, shall remain due upon this security, on the reasonable request of the said [*mortgagee*], his executors, administrators, and assigns, but at the costs and charges in the law of the said [*mortgagor*], his executors, administrators, or assigns, make, do, and execute all such further and other acts and assurances, for the better and more perfectly assigning and assuring the said premises hereinbefore mentioned, and intended to be hereby assigned, with the appurtenances, unto the said [*mortgagee*], his executors, administrators, and assigns, for all the residue which shall be then unexpired of the said term of forty years, as by the said [*mortgagee*], his executors, administrators, or assigns, or his, their, or any of their counsel shall be reasonably devised or advised and required: *And*

For quiet enjoyment after default.

For further assurance.

ASSIGNMENT OF LEASEHOLD MESSUAGE, &c.

further, that he the said [*mortgagor*], his heirs, executors, or administrators, will, from time to time hereafter, so long as the said principal sum of £——, and interest, or any part thereof, shall remain due upon this security, pay, or cause to be paid, the said yearly rent reserved by the said recited indenture of lease, and perform and keep the covenants, conditions, and agreements therein contained, which, on the tenant's, lessee's, or assignee's part are and ought to be paid, performed, and kept; and shall and will save harmless and keep indemnified the said [*mortgagee*], his executors and administrators, and his and their lands and tenements, goods and chattels, therefrom.

And to pay rent and perform covenants of lease.

AND it is hereby declared and agreed by and between the said parties to these presents, that until such default shall happen to be made in payment of the said sum of £——, and interest, or any part thereof as aforesaid, the said [*mortgagor*], his executors, administrators, and assigns, shall hold and enjoy, and receive and take the rents and profits of the said piece or parcel of ground, messuage, or tenement and premises hereby assigned, for his and their own use, without any hindrance or interruption by the said [*mortgagor*], his executors, administrators, or assigns, or any person or persons claiming under him or them.

Agreement for quiet enjoyment by mortgagor until default.

AND WHEREAS the said [*mortgagor*] hath this day caused the sum of £—— to be insured on the said messuage or tenement and premises hereby assigned, in the —— fire-office, in the name of the said [*mortgagee*], by a certain policy of insurance, bearing date the —— day of this present month of——, and numbered ——(*d*).

Recital of policy of fire-insurance.

NOW THEREFORE THIS INDENTURE FURTHER WITNESSETH, that the said [*mortgagee*] doth hereby declare and agree to and with the said [*mortgagor*], his executors, ad-

Declaration that mortgagee shall stand possessed of policy in trust for securing mortgage money, &c.

(*d*) In mortgages of leasehold property, it is frequently necessary to provide for fire-insurance, not only for the protection of the mortgagee against fire, but in compliance with the terms of the lease. It is obvious, that, where the lease, which is the subject of a mortgage, contains a clause imposing forfeiture in case of the breach of this or any other covenant, it behoves the mortgagee to satisfy himself that no breach has been committed antecedently to the mortgage, and to secure the power of prevent-

As to insurances made for the security of mortgagees.

ASSIGNMENT OF LEASEHOLD MESSUAGE, &c.

ministrators, or assigns, that he the said [*mortgagee*], his executors, administrators, and assigns, shall and will stand and be possessed of and interested in the policy of insurance, and all benefit and advantage thereof; *In trust* in the first place for the better securing the repayment of the said principal sum of ——, and interest, at the time and in the manner aforesaid; and after payment thereof, then in trust for the said [*mortgagor*], his executors, administrators, and assigns, and to be assigned and disposed of as he or they shall direct. And the said [*mortgagor*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*mortgagee*], his executors, administrators, and assigns, that he the said [*mortgagor*], his executors, administrators, or assigns, will, from time to time, during so long time as the said sum of £——, and interest, or any part thereof, shall remain due and owing upon this present security, pay and discharge all such sum and sums of money as shall be necessary for keeping on foot the said policy, and will, within —— days after the —— day of ——, in every year, deliver to the said [*mortgagee*], his executors, administrators, or assigns, the receipt for the same; And that if he the said [*mortgagor*], his executors or administrators, shall neglect or refuse to pay the said sums of money, or any of them, or to deliver such receipt as aforesaid, it shall be lawful for the said

In trust.

Covenant by mortgagor to keep policy on foot, and deliver receipts for premiums.

And on neglect that mortgagee may keep up insurance.

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ing any future breach. Such clauses of forfeiture of course diminish the value of the security. There are two methods of effecting fire-insurances for the protection of mortgagees: the one is, for the person making the security to effect the policy in his own name, and to assign it to the mortgagee; the other, for the mortgagor to effect it in the name of the mortgagee. The precedent in the text illustrates the former, and the next precedent the latter of these modes. Either of them may be adopted, as is found to be most convenient. In the case of *fire*-insurances, the principal advantage of effecting the insurance in the name of the creditor is, that no assignment is requisite; but in regard to *life*-insurance, this course has the further advantage of the policy not being liable to be affected by the death of the assured by suicide or the hands of justice, which generally vacates a policy effected by a person on his own life. See some observations on life-insurances, *post*, Vol. 6, p. 139, Vol. 7, p. 448.

[*mortgagee*], his executors, administrators, or assigns, if he or they shall think proper, but not otherwise, to pay and discharge the same, or to take out a new policy in the same or any other office, for insuring the said messuage or tenement and premises in the said sum of £——, and that he the said [*mortgagor*], his executors, administrators, or assigns, will, on demand, pay unto the said [*mortgagee*], his executors, administrators, or assigns, all and every such sum and sums of money as he or they shall lay out or expend for any such insurance or insurances now made or hereafter to be made as aforesaid, with interest for the same, at the rate of *5l. per cent. per annum*, from the time or respective times of the expenditure of the same; and that all and every such sum and sums of money, and interest, shall be charged and chargeable on the said piece or parcel of ground, messuage, or tenement and premises hereby assigned, and the same shall not be redeemed or redeemable, in any court of law or equity, until payment thereof unto the said [*mortgagee*], his executors, administrators, and assigns. IN WITNESS, &c.

ASSIGNMENT OF LEASEHOLD MESSUAGE, &c.

ASSIGNMENT *of* RENEWABLE LEASEHOLDS, *with* USUAL COVENANTS, *including* COVENANT *to* RENEW LEASE. *Also* ASSIGNMENT *of* POLICY *of* FIRE INSURANCE—*Agreement by* MORTGAGEE *to* ACCEPT *a* REDUCED RATE *of* INTEREST *on* PUNCTUAL PAYMENT.

ASSIGNMENT OF RENEWABLE LEASEHOLDS.

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——; BETWEEN [*mortgagor*], of &c., of the one part; and [*mortgagee*], of &c., of the other part. WHEREAS, by a certain indenture of lease, bearing date on or about the —— day of December, 1810, and made between the governors and guardians of the hospital for the maintenance and education of exposed and deserted young children, of the first part; [A. B.], therein describ-

Parties.

Recital of lease.

ASSIGNMENT OF RENEWABLE LEASEHOLDS.

ed, of the second part; and the said [*mortgagor*], of the third part: It was witnessed, that, in consideration as well of the expense which the said [A. B.] and [*mortgagor*] had been at, in erecting and finishing the buildings thereby demised, as of the rent, covenants, and agreements thereinafter contained, and for other the considerations therein expressed, the said governors and guardians (by the direction of the said [A. B.]), did demise and lease unto the said [*mortgagor*], his executors, administrators, and assigns, *(describe piece of ground)*, together with two brick messuages erected and built thereon, which ground, with the dimensions and abuttals thereof, are more particularly described in the plan drawn in the margin of the indenture now in recital, together with all the rights, members, and appurtenances, thereunto belonging, or in anywise appertaining, (except and always reserved unto the said governors and guardians, and their successors and assigns, the free passage or running of water and soil coming from any other buildings and lands contiguous to the premises thereby demised, in and through the water-courses made under the demised premises), *To hold* the said ground, buildings, and premises, with the appurtenances, (except as aforesaid), unto the said [*mortgagor*], his executors, administrators, and assigns, from the —— day of ——, for the term of ninety-nine years, at the rent of a pepper-corn for the first three years, and for the remainder of the term, (save the last half year), the yearly rent of £——, payable quarterly without any deduction, and for the last half year the rent of 20*l.*, and subject to the several covenants and agreements in the now reciting indenture contained, and on the lessee's part to be observed and performed: And whereas, *(recite lease from the mayor, citizens, and commonalty of London to the mortgagor for forty years)*; And whereas

Of agreement for loan.

the said [*mortgagor*], having occasion for the loan of the sum of £——, hath applied to and requested the said [*mortgagee*] to advance and lend him the same, which he the said [*mortgagee*] hath consented and agreed to do, upon having the repayment thereof with interest secured to him by an assignment of the said several hereinbefore in part recited indentures of lease, and of the said several pieces or parcels of ground, messuages or tenements,

erections, buildings, and premises therein respectively comprised, for the residue of the said several terms of years thereby respectively granted in manner hereinafter expressed. NOW THEREFORE THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £—— of lawful money of the United Kingdom, paid by the said [*mortgagee*] to the said [*mortgagor*] at or before the sealing and delivery of these presents, the receipt of which said sum of £—— he the said [*mortgagor*] doth hereby acknowledge, and from the same and every part thereof doth acquit, release, and for ever discharge the said [*mortgagee*], his heirs, executors, and administrators; He the said [*mortgagor*] *Hath* granted, bargained, sold, assigned, and transferred, and by these presents *Doth* grant, &c., unto the said [*mortgagee*], his executors, administrators, and assigns, ALL THOSE the said two several pieces or parcels of ground, with the three messuages or tenements, and other erections and buildings thereon erected and built in the said two several recited indentures of lease of the —— day of ——, and the —— day of ——, and also hereinbefore described, and which are now better known by the description following, that is to say, ALL THAT messuage or tenement numbered ——, in —— street, being the —— house northward from —— street, and which, by a certain under-lease bearing date on or about the —— day of ——, ——, was demised by the said [*mortgagor*] to [*under-lessee*] for the term of —— years, from the —— day of ——, at the yearly rent of *30l. 5s.*; *And also* ALL THAT messuage or tenement numbered ——, in —— street aforesaid, being the —— house northward from —— street, and which by a certain under-lease bearing date on or about the —— day of ——, was demised by the said [*mortgagor*] to [*under-lessee*] for the term of —— years, from the —— day of ——, determinable at the option of the said [*under-lessee*], his executors, administrators, or assigns, at the expiration of the first —— years thereof, at the yearly rent of *50l.*; *And also*, ALL THAT other messuage or tenement numbered ——, in —— street aforesaid, being the —— house northward from —— street, now or late in the tenure or occupation of —— [*un-*

ASSIGNMENT OF FREEHOLD LEASEHOLDS.

Testatum.

In consideration of money advanced;

Mortgagor assigns to mortgagee.

Parcels by recent description.

ASSIGNMENT OF RENEWABLE LEASEHOLDS.

der-tenant], as tenant from year to year, at the yearly rent of 94*l.*; And all and singular other the premises whatsoever, if any, which are comprised in, and were demised by the said several indentures of lease, or intended so to be, with their and every of their respective rights, members, and appurtenances: *And also*, all the estate, right, title, interest, term and terms of years yet to come and unexpired, right, and benefit of renewal, trust, property, possession, benefit, advantage, claim and demand whatsoever, both at law and in equity, of him the said [*mortgagor*], of, in, to, or out of the same premises, and every or any part or parcel thereof: Together with the said two several hereinbefore recited indentures of lease, of the —— day of ——, and the —— day of ——, and the said several yearly rents of 36*l.* 5*s.*, 50*l.*, and 94*l.* respectively reserved and made payable by the said several under-leases hereinbefore referred to (*a*), and the counterparts of the same several under-leases, and all benefit and advantage of the same respectively: TO HAVE AND TO HOLD the said several pieces or parcels of ground, messuages or tenements, erections and buildings, and all and singular other the premises hereby assigned, or intended so to be, with their and every of their appurtenances, unto the said [*mortgagee*], his executors, administrators, and assigns, henceforth during all the residue and remainder now to come and unexpired of the said several terms of years granted by the said several hereinbefore recited indentures of lease, of the —— day of ——, and the —— day of ——, and for all

And all the estate, &c.

Lease and rents reserved by under-leases and counterparts thereof.

Habendum.

Operation of mortgage upon rents reserved by subsisting leases.

(*a*) Rents reserved on leases subsisting at the time of the mortgage, (whether the mortgage be made by grant of the fee, demise, underlease, or assignment,) pass as incident to the reversion, and therefore need not be specifically mentioned, nor indeed is it strictly accurate to make them a distinct subject of grant, unless there are words in the *habendum* applicable to all *other* the estate of the mortgagor, (as in the present case); inasmuch as, without words to this effect, the deed would read as a grant of the rents, (for the *habendum* must be read as referring to all the premises), for the whole of the term, *i. e.* for a longer period than they endure. See an observation as to the reversion clause *post*, Vol. 8, p. 71.

other the term, estate, and interest, or respective terms, estates, and interests, of the said [*mortgagor*] in the said premises respectively; *But subject nevertheless* to the proviso for redemption hereinafter contained, (that is to say,) PROVIDED ALWAYS, and these presents are upon this condition, that if the said [*mortgagor*], his heirs, executors, or administrators, do and shall pay or cause to be paid unto the said [*mortgagee*], his executors, administrators, or assigns, on the —— day of ——, which will be in the year ——, at or in the common dining-hall of the Middle Temple, in the said city of London, the sum of £——, of lawful money aforesaid, and also do and shall, in the meantime, pay to him or them interest for the same after the rate of 5*l.* for every 100*l.* by the year, such interest to be paid by equal portions half-yearly, on the —— day of —— and the —— day of ——, in every year, until the said —— day of ——, and the first half-yearly payment thereof to be made on the —— day of —— next ensuing the date of these presents, without making any deduction or abatement whatsoever from or out of the same principal sum and interest, or any part thereof, for or on account of any taxes, charges, rates, assessments, or impositions, or for or in respect of any other matter, cause, or thing whatsoever; then, and from thenceforth, this present indenture and the assignment hereby made, shall cease, determine, and be absolutely void, to all intents and purposes whatsoever. AND the said [*mortgagor*] doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the said [*mortgagee*], his executors, administrators, and assigns, that he the said [*mortgagor*], his heirs, executors, or administrators, will pay or cause to be paid unto the said [*mortgagee*], his executors, administrators, or assigns, the said principal sum of £—— intended to be hereby secured, together with interest for the same after the rate aforesaid, at the several days or times, and in the manner hereinbefore appointed for the payment thereof respectively: AND ALSO, that the said several hereinbefore recited indentures of lease are now good, sufficient, and subsisting leases, valid in the law for all the residue and remainder of the said several terms of years now to come and unexpired

ASSIGNMENT OF LEASEHOLDS.

Proviso for redemption.

Covenant by mortgagor to pay principal and interest moniez.

That leases are valid.

ASSIGNMENT OF RENEWABLE LEASEHOLDS.

—That mortgagor has power to assign.

therein respectively, and are in no way forfeited, surrendered, impeached, determined or otherwise become void or voidable: *And that* he the said [*mortgagor*] now hath in himself good right, and full power and authority to assign the several pieces or parcels of ground, messuages or tenements, buildings and premises hereinbefore assigned, or intended so to be, with their and every of their appurtenances, unto the said [*mortgagee*], his executors, administrators, and assigns, in manner aforesaid, and according to the true intent and meaning of these presents: *And further*, that in case default shall be made of or in payment of the said sum of £—— and interest, or any part thereof respectively, at either of the several days or times, and in the manner hereinbefore appointed for payment thereof, then, and from thenceforth, it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, into all or any part of the said pieces or parcels of ground, messuages or tenements, buildings and premises hereby assigned, to enter, and the same peaceably and quietly to hold and enjoy, during all the residue of the said several terms of years which shall be then to come and unexpired, and the rents and profits thereof to receive and take for their own use and benefit without any lawful interruption, claim, or demand whatsoever, of or by him the said [*mortgagor*], his executors, administrators, or assigns, or any other person or persons whomsoever: *And that* free and clear [and freely, clearly, and absolutely acquitted, exonerated, and discharged, or otherwise by the said [*mortgagor*], his executors or administrators, well and sufficiently saved harmless and kept indemnified] from and against all manner of [former and other grants, bargains, sales, leases, mortgages, assignments, judgments, extents, estates, titles, troubles, charges, and] incumbrances whatsoever, except the several under-leases hereinbefore referred to: *And moreover*, that he the said [*mortgagor*], his executors, administrators, and assigns, and every other person having or lawfully claiming any estate, right, title, or interest of, in, to, or out of the said several pieces or parcels of ground, messuages or tenements, buildings and premises hereby assigned, or intended so to be, or any of them, or

—For quiet enjoyment after default.

Free from all incumbrances.

For further assurance.

any part thereof, (save and except the person or persons entitled to the benefit of the reservations and lessee's covenants contained in the said hereinbefore recited indentures of lease, of the —— day of ——, and the —— day of ——, respectively, and all other the persons whose respective estates and interests are hereinbefore excepted), shall and will, at any time or times thereafter, upon every reasonable request of the said [*mortgagee*], his executors, administrators, or assigns, and at the costs and charges of the said [*mortgagor*], his executors, administrators, or assigns, make, do, and execute, or cause to be made, done, and executed, every such further act, deed, assignment, and assurance in the law whatsoever, for the more absolutely and satisfactorily assigning and assuring the same premises unto the said [*mortgagee*], his executors, administrators, and assigns, for all the residue of the said several terms of years which shall be then to come and unexpired therein respectively, according to the true intent and meaning of these presents, as by the said [*mortgagee*], his executors, administrators, or assigns, or his or their counsel, shall be reasonably advised and required: *And also*, that the said [*mortgagor*], his heirs, executors, or administrators, will henceforth, from time to time, pay, discharge, and perform the several rents and covenants reserved and contained by and in the said several hereinbefore recited indentures of lease of the —— day of ——, and the —— day of ——, and which on the part of the lessee therein respectively named, or his assignee, ought to be paid and performed; And also the rents and covenants which shall be reserved and contained by and in any renewed lease or leases that shall be obtained in pursuance of the power in that behalf hereinafter contained (*b*); [And will from time to time, and at all times hereafter, save harmless, and keep indemnified, him

ASSIGNMENT OF RENEWABLE LEASEHOLDS.

And to pay rents and perform the covenants in the recited leases:

And also in any renewed lease.

And indemnify mortgagee therefrom.

(*b*) If the mortgagee renews, he must enter into the lessee's covenants. The only mode of avoiding this is to make the mortgagor take the renewed lease, and assign it to the mortgagee, subject to the equity of redemption subsisting under the mortgage. For the covenants for renewal, *vide post*, p. 314.

ASSIGNMENT OF RENEWABLE LEASEHOLDS.

the said [*mortgagee*], his executors, administrators, or assigns; and also the said premises hereby assigned, and every part thereof, from all actions, suits, distresses, and other proceedings, at law or in equity, costs, charges, damages, and expenses, by reason or in respect of such rents and covenants, or of any of them (*c*). (*Agreement for quiet enjoyment until default, ut ante*, p. 303). AND WHEREAS the said [*mortgagor*], by a certain policy of insurance, under the common seal of the corporation of the Royal Exchange Insurance Office, for the insurance of houses from loss by fire, numbered ——, and dated the —— day of —— last, hath insured the sum of £—— upon the said three messuages or tenements, erections, and buildings, in —— street aforesaid, not exceeding £—— on each house. NOW THIS INDENTURE WITNESSETH, that [for the better securing to the said [*mortgagee*], his executors, administrators, and assigns, the repayment of the said sum of £——, with interest for the same, in the manner hereinbefore mentioned; and also, in consideration of the sum of 10*s.* of lawful money aforesaid to the said [*mortgagor*] in hand, at or before the sealing and delivery of these presents, paid by the said [*mortgagee*], the receipt whereof is hereby also acknowledged,] he the said [*mortgagor*] *Hath* bargained, sold, assigned, and transferred, and by these presents *Doth* &c., unto the said [*mort-*

Recital of policy of fire insurance.

Second *Testatum.*

Mortgagor assigns policy.

Mortgagee should see that rent is paid, buildings kept in repair, &c.

(*c*) A mortgagee acts unwisely who satisfies himself with merely seeing that his interest is regularly paid. He should also ascertain that the property, of which his security consists, is undergoing no deterioration. It sometimes happens, owing to neglect in this particular, that when, from the failure in payment of the money secured, a mortgagee proceeds to take possession of the property, being leasehold, he finds the reserved rent is greatly in arrear, and the buildings in so dilapidated a state as to require a large expenditure to make them productive, to say nothing of the liability to eviction, which is often a consequence of such a state of things. A mortgagee should always ascertain that the rent is regularly paid; and, if the mortgage be of buildings, that they are insured and kept in repair; and unless this is the case, he should take them into his own hands. Any sums he may expend for these purposes, will be allowed him with interest. *Hardy* v. *Reeves*, 4 Ves. 466. See also *Quarrell* v. *Beckford*, 1 Madd. 282.

gagee], his executors, administrators, and assigns, ALL THAT the said recited policy of insurance, No. ——, and all benefit and advantage thereof, and all and every sum and sums of money due or to become due or payable thereupon, or by virtue thereof: TO HOLD, receive, take, and enjoy, the said policy of insurance, sum and sums of money, and other the premises hereby lastly assigned, or intended so to be, unto the said [*mortgagee*], his executors, administrators, and assigns, to and for their own use and benefit; *But subject nevertheless* to the same or the like proviso for redemption as is hereinbefore contained concerning the said leasehold premises hereby assigned, or intended so to be. AND the said [*mortgagor*], for himself, his heirs, executors, and administrators, doth hereby further covenant and agree with the said [*mortgagee*], his executors, administrators, and assigns, that he the said [*mortgagor*], his executors, or administrators, shall and will, during so long time as the said principal sum of £ —— and interest, or any part thereof respectively, shall remain due and owing upon this present security, from time to time pay and discharge all such sum and sums of money as shall be necessary for continuing and keeping on foot the said policy of insurance hereby assigned; and shall and will, within fourteen days after the —— day of —— in every year, (being the time at which the annual premium and duty thereon will become due), deliver unto the said [*mortgagee*], his executors, administrators, or assigns, the annual receipt for the payment of such premium and duty; And that if the said [*mortgagor*], his executors, administrators, or assigns, shall neglect or refuse to pay the yearly or other premiums and duty, or to deliver such receipt in manner aforesaid, it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, if he or they shall think fit, to pay and discharge the sum and sums of money which shall be necessary for keeping on foot the said policy, or to insure and keep insured the said messuages or tenements, erections, and buildings, in the same or any other insurance office to be approved of by him or them, in the same or any other sum or sums not exceeding the full value thereof respectively: And that the said [*mort-*

ASSIGNMENT OF RENEWABLE LEASEHOLDS.

Habendum.

Covenant by mortgagor to pay the premiums on policy, and deliver receipts to mortgagee.

ASSIGNMENT OF RENEWABLE LEASEHOLDS.

gagor], his executors, administrators, or assigns, will immediately thereupon pay unto the said [*mortgagee*], his executors, administrators, or assigns, all such sum and sums of money as the said [*mortgagee*], his executors, administrators, or assigns, shall have laid out or expended in keeping on foot the said policy, or in effecting or continuing such insurance or insurances as aforesaid, together with interest at the rate of *5l. per centum per annum* for such sum and sums of money, to be computed from the time or respective times of the payment, advancement, or expenditure of the same respectively, (if any such time shall have elapsed); and the said sum and sums of money, with interest thereon as aforesaid, shall be charged and chargeable on all and singular the said several messuages or tenements, erections, buildings, and premises hereby assigned: And the same, or any part thereof, shall not be redeemed or redeemable at law or equity, until payment thereof unto the said [*mortgagee*], his executors, administrators, or assigns: *And further* (*e*), the said [*mortgagor*], for him-

Covenant by mortgagor to renew lease.

Rights and obligation of mortgagor and mortgagee, as to renewal.

(*e*) Without a covenant to this effect, it is clear that a mortgagor is not bound to renew; but whether there is any obligation on him, or any express authority on the part of the mortgagee, to renew or not, the mortgagee may, if he chooses, effect a renewal, and the expenses incurred thereby will be a charge upon the property in his hands, with interest on the monies advanced. *Manlove* v. *Ball*, 2 Vern. 84; *Lacon* v. *Mertins*, 3 Atk. 4; *Woolley* v. *Drag*, 2 Anst. 551.

For this reason many practitioners omit the declaration, (*post*, p. 316, in brackets), that the property shall be charged with the expenses of the renewal, simply making the mortgagor covenant to renew, and, if he neglect to do so, and the mortgagee renews, to reimburse the mortgagee the expenses so incurred. If no such declaration is inserted, it is of course unnecessary to make the stamp on the mortgage extend to the expenses of renewal. Indeed, it is not clear that in any case such a stamp is requisite; for it may be contended, that, as equity treats the expenses of a renewal as a charge upon the property, without any express stipulation, the clause charging them is nugatory, and does not render the deed liable to a larger duty. This argument, however, loses much of its force, if any variation is made in the terms which a Court of equity would impose; and such a variation frequently occurs in regard to the rate of interest, which,

ASSIGNMENT OF RENEWABLE LEASEHOLDS.

self, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*mortgagee*], his executors, administrators, or assigns, that he the said [*mortgagor*], his executors or administrators, will, from time to time, so long as the said principal sum of £—— and interest, or any part thereof respectively, shall remain due upon this security, at his or their own costs and charges, at the usual and accustomed time or times of renewal, apply for and endeavour to obtain a new lease or demise from the said mayor and commonalty and citizens of London, and their trustees, of the premises comprised in the said hereinbefore recited indenture of the —— day of ——, for a further term of forty years; and, immediately after obtaining every such new lease or demise, shall and will assign and make over the same, and the premises therein comprised, to the said [*mortgagee*], his executors, administrators, or assigns, subject to such right and equity of redemption, and for such intents and purposes, as shall be then subsisting by virtue of these presents; *And further*, that in case the said [*mortgagor*], his executors, administrators, or assigns shall refuse or neglect to take the necessary steps for obtaining such renewed lease, within —— days after notice in writing from the said [*mortgagee*], his executors, administrators, or assigns, requiring him so to do, it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, in every such case, if he or they shall think proper, to apply for and obtain such new lease or demise as aforesaid, and that he the said [*mortgagor*], his executors, administrators, or assigns, will thereupon pay or cause to be paid to him the said [*mortgagee*], his executors, administrators, or assigns, all and every sum and sums of money which he or they shall expend in and about

And in default that mortgagee may renew if he thinks proper.

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by the rule of Court, is 4 *per cent.*, but by stipulation commonly 5 *per cent.* At all events, it is better to avoid the question by having a stamp sufficient to include the renewal expenses, limiting the total amount (as in the precedent in the text) to a given sum, by which means the addition to the stamp is generally very inconsiderable. In some cases, the sum may be sufficiently extended to cover the costs of renewal, without any increase of duty, as where the sum advanced does not reach the maximum which the act allows to be included under that amount of stamp.

ASSIGNMENT OF RENEWABLE LEASEHOLDS.

Declaration that sums to be expended by mortgagee for renewal shall be a charge.

every such renewal, with interest thereon at the rate of *5l. per centum per annum*, from the time or respective times of the expenditure thereof. [And it is hereby declared and agreed, that the said sum and sums of money so to be expended by the said [*mortgagee*], his executors, administrators, or assigns, and interest for the same as aforesaid, shall be a charge upon the said renewed lease and the premises therein comprised, *and upon the other premises hereby assigned, or intended so to be* (*f*); and such said lease and premises respectively shall not be redeemed or redeemable at law or in equity, until full payment thereof unto the said [*mortgagee*], his executors, administrators, or assigns: *Provided nevertheless*, and it is hereby declared, that the whole amount of the principal monies secured by these presents shall not exceed the sum of £——(*g*)].

(*f*) The words in italics only apply where the security comprises property to which the right of renewal does not extend, as in the present case.

(*g*) Sometimes the covenant for renewal is in the following form—

Variation in form of covenant to renew.

"That he the said [*mortgagor*], his executors, or administrators, will from time to time and at any time hereafter, so long as any sum of money shall remain due upon this security, join and concur with the said [*mortgagee*], his executors, administrators, or assigns, in all proper and necessary acts and deeds whatsoever, by surrender or otherwise, for obtaining a renewal of the subsisting lease for the time being of the premises at ——, hereby assigned, or intended so to be, unto the said [*mortgagee*], his executors, administrators, or assigns, subject to the subsisting right, title, or equity of redemption of him the said [*mortgagor*], his executors, or administrators, under or by virtue of these presents; and will, at the option of the said [*mortgagee*], his executors, administrators, or assigns, either take the said renewed lease to himself the said [*mortgagor*], his executors or administrators, and immediately afterwards assign the same to the said [*mortgagee*], his executors, administrators, or assigns, or consent to and concur in the same being granted to him the said [*mortgagee*], his executors, administrators, or assigns; And also, that he the

PROVIDED ALWAYS, and it is hereby lastly declared and agreed by and between the said parties to these presents, and particularly the said [*mortgagee*], for himself, his heirs, executors, and administrators, doth hereby covenant

ASSIGNMENT OF RENEWABLE LEASEHOLDS.

Proviso and covenant that interest shall be

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said [*mortgagor*], his executors, or administrators, will pay the fine and all other expenses attending the said renewal, and of such assignment, if any, as aforesaid; And that if, after notice in writing given by the said [*mortgagee*], his executors, administrators, or assigns, to the said [*mortgagor*], his executors, or administrators, or left at his or their last place of abode in England, requiring him or them to make or concur in such renewal as aforesaid, the said [*mortgagor*], his executors or administrators, shall refuse or neglect so to do, it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, if he or they shall think proper, by surrender or other disposition of the then subsisting lease of the said premises, or otherwise, to obtain a renewal of such lease, subject to such right, title, and equity of redemption as aforesaid; and the said [*mortgagor*], his executors, or administrators, will, on demand, pay and reimburse unto the said [*mortgagee*], his executors, administrators, or assigns, the costs, charges, and expenses, which he or they shall have paid or incurred in or about such renewal, together with interest for the same after the rate of *5l. per cent. per annum*, from the time or respective times of the payment thereof; and the premises to be comprised in the said renewed lease, or other the premises hereby assigned, shall not be redeemed until payment by the said [*mortgagor*], his heirs, executors, administrators, or assigns, unto the said [*mortgagee*], his executors, administrators, or assigns, of the amount of such costs, charges, and expenses, and the interest for the same, as well as the said principal sum of £—— and interest, in manner aforesaid, and according to the true intent and meaning of these presents: *Provided nevertheless*, that the total amount of the principal monies intended to be hereby secured shall not exceed the sum of £——."

ASSIGNMENT OF RENEWABLE LEASEHOLDS.

and agree with the said [*mortgagor*], his executors, administrators, and assigns, that if the said [*mortgagor*], his executors, or administrators, shall, from time to time, until payment of the said principal sum of £——, hereby secured, punctually pay or cause to be paid unto the said [*mortgagee*], his executors, administrators, or assigns, interest, after the rate of 4*l.* 10*s.* for every 100*l.* by the year, for the said sum of £——, upon or within twenty-eight days next after the said —— day of ——, and the said —— day of ——, in every year, clear of all deductions whatsoever; then, in consideration of such punctual payment, the said [*mortgagee*], his executors, administrators, or assigns, shall and will, *from time to time, so often as the same interest shall be paid at or within the days or times aforesaid*, accept the reduced rate of interest aforesaid, in lieu and full satisfaction of the interest hereinbefore covenanted to be paid; any thing hereinbefore contained to the contrary notwithstanding (*h*). IN WITNESS, &c.

reduced on punctual payment.

Agreement for reduction of interest on punctual payment.

Variation, where the mortgagor is to lose the future benefit of the covenant, on failure of payment once.

(*h*) These clauses are frequently introduced in mortgages, and are found very useful in securing the punctual payment of the interest. In framing them care should be taken to make it clearly apparent, whether the reduced interest is to be accepted as often as it is tendered within the time, or whether the failure on any *one* occasion is to deprive the mortgagor of the benefit of the reduction, as to all future payments. If this latter is intended, *the words in the text in italics should be omitted*, and the following words added at the end of the clause:

"*Provided nevertheless*, that, if default shall be made in the payment of the whole, or any part of any one of the same half-yearly payments of reduced interest, within the said period of twenty-eight days after the same shall have become payable as aforesaid, then the said [*mortgagee*], his executors, administrators, or assigns, shall not afterwards be obliged, by virtue of this present covenant, to accept less than the full rate of interest reserved in and by the proviso for redemption hereinbefore contained, notwithstanding the payment or tender of any sum or sums of money on account thereof within the several times

aforesaid, any rule of law or equity to the contrary notwithstanding."* ASSIGNMENT OF RENEWABLE LEASEHOLDS.

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* It has sometimes been made a question in clauses of this nature, whether a Court of Equity will relieve against the larger rate of interest, if payment be not made within the prescribed period. Whether equity will compel mortgagor to accept the reduced interest after the day.

In *Brown* v. *Barkham*, 1 P. W. 653, Lord Ch. *Parker* expressed an opinion, that the Court would relieve if only a short time had elapsed, but not in the case of a long arrear.

But the distinction adopted in most of the cases, and which may now be considered as established, is this: that if interest be reserved, with an agreement (as in the text) for a reduction on punctual payment, the condition must be complied with, or the higher rate of interest will become payable as well in equity as at law; but if the lower rate of interest be first reserved, with an agreement, that, if it be not paid within a given time, larger interest shall become payable, Equity regards such a stipulation in the nature of a penalty, and will relieve. *Joy* v. *Cox*, Pre. Ch. 160; *Lady Holles* v. *Wyse*, 2 Vern. 289; *Shode* v. *Parker*, Ib. 316; *Nicholls* v. *Maynard*, 3 Atk. 519; *Stanhope* v. *Manners*, 2 Ed. 197. See also 3 Burr. 1374. These cases overrule Marquess of *Halifax* v. *Higgens*, 2 Vern. 134.

Lord *Eldon*, however, on a late occasion, referred to *both* these cases as falling within the rule of equitable relief. See *Seton* v. *Slade*, 7 Ves. 273. But the point was only incidentally noticed by his Lordship, and the distinction, it is conceived, has been too often recognised now to be called in question. The interference of the Court in the case under consideration could only be grounded on the hypothesis, that the parties had a different intention from that which is expressed, and that though they have declared the original agreement to be for *5l. per cent.*, with a reduction on punctual payment, yet that, in fact, the real intention was to reserve the lower interest, with an agreement for an advance on non-payment within the time specified. But it may be asked, how does the Court arrive at this conclusion in opposition to the express declaration of the parties? The intention expressed is not only a possible, but a very reasonable one, and the effect of the Court's interference must be, to deprive mortgagors of the benefit of such stipulations, by preventing their insertion.

A question on the construction of a clause of this nature arose in the case of *Stanhope* v. *Manners*, 2 Ed. 197, where interest on a mortgage was reserved at *5l. per cent.*, with an agreement, that *when and so often* as the interest on the said sum of 10,000*l.* should be paid half yearly, on the nineteenth day, &c., or within three calendar months after each of the said days respectively, the sum of 62*l.* 10*s.* should be abated and deducted out of every half-year's interest which should be so paid, and interest after the rate of 3*l.* 15*s.* for every 100*l.* of the said 10,000*l.*, *so often as such interest should be paid within the times aforesaid*, should be accepted in lieu of the *Stanhope* v. *Manners*.

ASSIGNMENT OF RENEWABLE LEASEHOLDS.

interest before agreed to be paid. Default was made in payment of the first half-year's interest within the three months, but the second was tendered within the time; and one of the questions was, whether the first default put an end to the agreement for the reduction as to the subsequent payments: and it was held that it did not.

It is difficult to perceive how the clause could well have been framed in terms more conclusively shewing this to have been the intention of the parties.

MORTGAGE BY UNDER-LEASE.

MORTGAGE *of Leaseholds by* UNDER-LEASE, *an inconsiderable Reversion being left in the Mortgagor to prevent the Mortgagee from becoming liable to the Rent and Covenants in the Lease* (*a*). *(A short Form).*

Parties.

THIS INDENTURE, &c., BETWEEN [*mortgagor*], of &c., of the one part; and [*mortgagee*], of &c., of the

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As to mortgages by way of under-lease.

(*a*) *Vide ante*, Vol. 2, p. 52, n. (*a*). As to the comparative advantages of mortgages by assignment and under-lease, *vide ante*, p. 233. Where there is no covenant to renew on the part of the lessor, particularly if the rent is large, and the lessee's covenants are of an onerous nature, an under-lease is to be preferred. The covenant to repair has sometimes entailed a ruinous responsibility on a mortgage-assignee, where he, being out of possession, has neglected to examine the state of the buildings, and it has even happened, in some cases, that the mortgagee has not been made acquainted with the breach of covenant until after he has parted with the estate. A mortgagee, therefore, who has taken an assignment, should not give up the property until he has ascertained that the covenants have been duly performed during his ownership.

Some persons are in the habit of introducing into mortgages by way of under-lease, a declaration by the mortgagor, that he will stand possessed of the reversionary interest not included in the mortgage, in trust for the mortgagee; but the plan is objectionable, because it is doubtful, whether, in such a case, the *lessor* might not compel the mortgagee to take an assignment, or, in other words, to clothe his equitable interest with the legal estate, and thereby subject himself to

other part. WHEREAS &c. (*Recital of lease to mortgagor for forty years*); AND WHEREAS the said [*mortgagor*], having occasion to borrow at interest the sum of £——, hath requested the said [*mortgagee*] to advance him the same, which he the said [*mortgagee*] hath agreed to do on the security hereinafter mentioned. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration &c., (*ut ante*, p. 307), the said [*mortgagor*] *Hath* granted, bargained, sold, and demised (*b*), And by these presents *Doth* &c., unto the said [*mortgagee*], his executors, administrators, and assigns, all and singular the messuage or dwelling-house, garden, and premises hereinbefore described, and comprised in and intended to be demised by the said hereinbefore in part recited indenture of lease, with their and every of their rights, members, and appurtenances: TO HAVE AND TO HOLD the said premises hereby demised unto the said [*mortgagee*], his executors, administrators, and assigns, henceforth during all the residue now unexpired of the said term of forty years, granted by the said recited indenture of lease as aforesaid, except the last day thereof, *Subject nevertheless* to the proviso or agreement for redemption hereinafter contained, that is to say, *Provided always*, and it is hereby agreed and declared, that if the said [*mortgagor*], his ex-

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the legal liabilities of an assignee, on the principle of Lord *Thurlow's* decision in *Lucas* v. *Comerford*, 1 Ves. junr. 235, *S. C.* 3 B. C. C. 166, where his Lordship decreed the depositary of a lease given to secure a debt, to take an assignment at the instance of the lessor, in order to enable the latter to bring an action on the covenants. A person, therefore, who takes a deposit security on a lease, and wishes to avoid liability to the rent and covenants, should expressly stipulate for a derivative term only.

(*b*) In preparing under-leases by way of mortgage, where a small reversion is left in the mortgagor, the instrument should be in the usual form of a demise; and it is improper, as we often find done, to use words applicable to an assignment; for, whether the reversion retained be long or short, the instrument is, to all intents and purposes, a lease, and should be framed accordingly. Upon the same principle the mortgage ought not to be made subject to the rent and covenants of the original lease; for the mortgagee, holding under the mortgagor and not under the original lessor, is not liable to such rent and covenants.

MORTGAGE BY UNDER-LEASE.

ecutors, administrators, or assigns, or any of them, shall pay unto the said [*mortgagee*], his executors, administrators, or assigns, at or in the common dining-hall of the Middle Temple, in London, the sum of £——, of lawful money of the United Kingdom, on the —— day of —— now ensuing, with interest for the same in the meantime, after the rate of five pounds for every one hundred pounds by the year, without any deduction whatsoever, the said [*mortgagee*], his executors, administrators, or assigns, shall and will, at the request and costs of the said [*mortgagor*], his executors, administrators, or assigns, surrender and assure the said premises hereby demised, or intended so to be, with the appurtenances, unto the said [*mortgagor*], his executors, administrators, and assigns, or otherwise, as he or they shall direct, freed from all incumbrances to be made by the said [*mortgagee*], his executors, administrators, or assigns in the meantime. And the said [*mortgagor*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*mortgagee*], his executors, administrators, and assigns, (*to pay the mortgage money and interest, ut ante*, p. 263). *And* that the rent, covenants, and agreements reserved and contained in the said recited indenture of lease of the —— day of ——, on the part of the lessee therein named, his executors, administrators, and assigns, to be paid and performed, have been duly paid and performed up to the day of the date of these presents; *And also*, that he the said [*mortgagor*] hath, at this time, in himself full power and authority to demise the said premises unto the said [*mortgagee*], his executors, administrators, and assigns, in manner aforesaid; *And further*, that in case default shall be made of or in payment of the said sum of £——, and the interest thereof, or of any part thereof respectively, it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, at all times thereafter during the residue of the said term of forty years wanting one day hereby granted, peaceably to enter into and enjoy the said premises, and receive the rents thereof for his and their own use, free from all charges and incumbrances; *And moreover*, that he the said [*mortgagor*], his executors, administrators, and assigns, and every other person lawfully claiming any estate,

Mortgagor covenants that the rent and covenants in the lease are paid and performed.

That he has power to demise.

For quiet enjoyment after default.

Further assurance.

charge, or interest in, to, or out of the said premises, (except the person or persons entitled to the benefit of the rent and covenants reserved and contained in the said indenture of lease as aforesaid), or any part thereof, will, at the reasonable request of the said [*mortgagee*], his executors, administrators, or assigns, but at the expense of the said [*mortgagor*], his executors, administrators, or assigns, execute all such further acts, deeds, and assurances, for more effectually demising and assuring the said premises unto the said [*mortgagee*], his executors, administrators, and assigns, for all the residue which shall be then to come of the term hereby granted, and also, if thereunto required, of the reversion of one day, being the residue of the said term of forty years not included in the assurance hereby made, as by the said [*mortgagee*], his executors, administrators, or assigns, or his or their counsel in the law, shall be required; And also, that he the said [*mortgagor*], his heirs, executors, or administrators, will at all times hereafter, so long as any sum or sums of money shall remain due by virtue of this security, pay the rent and perform the covenants reserved and contained in the said indenture, and will also pay the taxes and other outgoings which shall accrue in respect of the said premises, *And keep the buildings thereon in good and substantial repair* (*c*). And it is hereby agreed and declared, that until default shall be made of or in payment of the said sum of £——, or the interest thereof, respectively, contrary to the proviso for redemption hereinbefore contained, it shall be lawful to and for the said [*mortgagor*], his executors, administrators, and assigns, paying the rent and performing the covenants in and by the said indenture of lease reserved and contained on the tenant's or lessee's part to be paid and performed, and paying the taxes and all other outgoings affecting the said premises, to hold and enjoy the said premises, and receive the rents thereof, for his and their own

MORTGAGE BY UNDER-LEASE.

To pay rent and perform covenants of lease.

Mortgagor to enjoy until default.

(*c*) But this is commonly one of the conditions in the lease. It should be observed, that, though a mortgagee-underlessee contracts no personal liability to the rents and covenants, prudence requires that he should ascertain that his security is not impaired in value by the mortgagor's neglect to perform them. (*Vide an observation ante*, p. 320).

MORTGAGE BY UNDER-LEASE.

use, without any interruption of, from, or by the said [*mortgagee*], his executors, administrators, or assigns, any thing hereinbefore contained to the contrary notwithstanding.

Mortgagor covenants to insure.

(*Add covenant to insure, ut ante*, p. 241). IN WITNESS, &c.

BUILDER'S MORTGAGE BY ASSIGNMENT.

MORTGAGE *of unfinished* LEASEHOLD HOUSES, *where the Money is to be advanced by Instalments as the Building proceeds; also* ASSIGNMENT *of* POLICY *of* INSURANCE; *with Authority to sell in default of Payment, with usual Indemnities to Purchasers, &c., and Covenants. Power to Mortgagee to enter and complete Buildings. (A short Form).*

Parties.

THIS INDENTURE, &c., BETWEEN [*mortgagor*], of &c., of the one part; and [*mortgagee*], of &c., of the other part.

Recitals.

WHEREAS (*recital of building lease to mortgagor*).

Of agreement for loan by instalments according to the progress of the building.

AND WHEREAS the said [*mortgagor*], being desirous of borrowing the sum of seven hundred pounds, in order to enable him to peform his said covenant to erect, upon the piece or parcel of ground so demised to him by the said [*lessor*] as aforesaid, a messuage or tenement with proper offices and other conveniences, hath applied to the said [*mortgagee*] to advance him the same, which he hath agreed to do in manner hereinafter mentioned, (that is to say); the sum of two hundred pounds, part thereof, when so much of the said intended erections or buildings should be completed, as upon a valuation thereof should appear to have cost the sum of four hundred pounds, and the sum of three hundred pounds, further part of the said sum, when the said intended erections and buildings should have been covered in; and the sum of two hundred pounds, residue of the said sum of seven hundred pounds, when the said intended erections and buildings should be completely finished and fit for habitation.

That certain progress had been made.

AND WHEREAS the said [*mortgagor*] hath, to the satisfaction of the said

[*mortgagee*], completed so much of the said intended erections and buildings, as upon a valuation thereof appears to have cost the sum of four hundred pounds; And by an instrument or policy of insurance of the Royal Exchange Insurance Office, bearing date the —— day of ——, and numbered ——, the said [*mortgagor*] hath insured the sum of —— on the messuage or tenement, erections, and buildings so by him erected and intended to be raised and completed as hereinbefore mentioned, and by the admeasurement and valuation particularly mentioned and set forth in the margin of the said instrument or policy. AND WHEREAS the said [*mortgagee*] hath, in pursuance of the said agreement in this behalf, advanced to the said [*mortgagor*] the sum of two hundred pounds; and for securing to the said [*mortgagee*], his executors, administrators, and assigns, the repayment thereof, and also of such further sums of money as may be advanced by the said [*mortgagee*] in further pursuance of the said agreement, with interest for the same respectively as hereinafter mentioned, the said [*mortgagor*] hath agreed to execute to the said [*mortgagee*], his executors, administrators, or assigns, such security as is hereinafter contained. NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of two hundred pounds so by the said [*mortgagee*] to the said [*mortgagor*] advanced and lent as hereinbefore is mentioned, the receipt of which said sum of two hundred pounds the said [*mortgagor*] doth hereby acknowledge, and from the same doth release and discharge the said [*mortgagee*], his heirs, executors, administrators, and assigns; and in consideration that the said [*mortgagee*] hath agreed to advance to the said [*mortgagor*] the further sums of three hundred pounds and two hundred pounds as hereinbefore recited, He the said [*mortgagor*] *Hath* granted, bargained, sold, and assigned, and by these presents *Doth* &c. unto the said [*mortgagee*], his executors, administrators or assigns, *(Parcels, first the leasehold, secondly the policy of insurance)*; And all the estate, right, title, interest, claim, and demand whatsoever of him the said [*mortgagor*], of, in, to, and out of the same premises respectively, together with the said indenture of lease, and all benefit and advantage of the same: TO HAVE AND TO HOLD the said piece or parcel of ground, messuage or tenement, erections and buildings

BUILDER'S MORTGAGE BY ASSIGNMENT.

That the sum of 200*l.* had been advanced.

Testatum.

Mortgagor assigns to mortgagee—

leasehold premises and policy.

Habendum as to leaseholds.

BUILDER'S MORTGAGE BY ASSIGNMENT.

and premises firstly hereinbefore described and assigned, unto the said [*mortgagee*], his executors, administrators, and assigns, henceforth during all the residue which is now unexpired of the said term of —— years granted by the said recited indenture of lease, and for all other the estate, term, and interest of the said [*mortgagor*] therein: AND TO HAVE, HOLD, RECEIVE, and take the said instrument or policy of insurance, and other the premises secondly hereinbefore described and assigned, unto the said [*mortgagee*], his executors, administrators, or assigns, subject nevertheless, as to all and singular the premises, to the proviso for redemption hereinafter contained. (*Add short power of attorney to receive insurance money, ut ante*, Vol. 1, p. 418).

Habendum as to policy.

Proviso for redemption.

PROVIDED ALWAYS, and it is hereby agreed and declared, that if the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall pay unto the said [*mortgagee*], his executors, administrators, or assigns, the sum of two hundred pounds of lawful money of Great Britain and Ireland, with interest for the same after the rate of five pounds for each hundred pounds for a year, on the —— day of —— now next ensuing, and in case the said [*mortgagee*], his executors, administrators, or assigns, shall, in pursuance of his said agreement in this behalf, or otherwise, advance any further sum or sums to or on the account of the said [*mortgagor*], his executors, administrators, or assigns, Then, if the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall, at the expiration of six calendar months from the time or times of such advancement or advancements respectively, pay unto the said [*mortgagee*], his executors, administrators, or assigns, all and every the sum or sums of money so advanced by him or them, with interest for the same respectively, after the rate aforesaid, from the time or respective times of his or their advancing the same respectively, clear of all deductions for taxes, or upon any other account whatsoever: And if the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall henceforth duly pay and perform the rents and covenants reserved and contained by and in the said hereinbefore recited indenture of lease, and which on the part of the lessee therein named ought to be paid and performed, and shall effectually keep indemnified him the said [*mortgagee*], his executors, administrators, or assigns, therefrom, Then and in

BUILDER'S MORTGAGE BY ASSIGNMENT.

such case, and immediately after such several payments, and such performance as aforesaid, he the said [*mortgagee*], his executors, administrators, or assigns, will, upon the request and at the costs of the said [*mortgagor*], his executors, administrators, or assigns, assign and assure the said piece or parcel of ground, messuage, or tenement, and other the leasehold premises hereby assigned, unto the said [*mortgagor*], his executors, administrators, or assigns, for all the residue which shall be then unexpired of the term hereby assigned therein, and also the said policy of insurance hereby assigned, free from all incumbrances whatsoever made by the said [*mortgagee*], his executors, administrators, or assigns: PROVIDED ALSO, and it is hereby further declared and agreed, that in case default shall be made in payment of the said several sums of money already advanced or to be advanced as aforesaid, or any of them, or the interest thereof, or any part of the same, respectively, at the respective times and in manner mentioned in the said proviso hereinbefore contained, or in the payment of the rent and performance of the covenants mentioned in the said proviso, it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns (*a*), without the concurrence of the said [*mortgagor*], his executors, administrators, or assigns, to sell and absolutely dispose of the said premises hereby assigned, or any part of the same respectively, either together or in parcels, and either by public auction or by private contract, with full liberty to buy in the same at any auction or auctions, and sell the same at any future auction or by private contract, and to rescind or alter the terms of any contract for sale which may have been entered into, and to assign and assure the same premises, when sold, unto the purchaser or purchasers thereof, his, her, or their executors, administrators, or assigns: *And*

Authority to sell in default of payment.

Application of

(*a*) If notice is to preeede the sale, add—

"giving three calendar months' previous notice in writing to the said [*mortgagor*], his executors, administrators, or assigns, or leaving the same at his or their last or usual place of abode in England, (unless there should be no personal representative of the said [*mortgagor*] for three calendar months after his decease), but in any case"

Variation, where notice is to be given.

out of the money to arise from such sale or sales, and the rents and profits of the said premises in the meantime, in the first place, to retain unto himself and themselves, the said [*mortgagee*], his executors, administrators, or assigns, the costs and expenses incurred in and about the said sale or sales, and in insuring the said premises from loss or damage by fire, in any sum not exceeding the sum of 700*l.*, if he or they shall think proper so to do, or in the payment of the rent and performance of the covenants reserved and contained by and in the said hereinbefore recited indenture of lease, on the lessee's part to be paid and performed, and otherwise in the execution of this present trust, with interest for the same after the rate aforesaid from the time of the incurring of the same costs and expenses respectively: and in the next place, to retain the said several sums of money which the said [*mortgagee*], his executors, administrators, or assigns, shall have paid or advanced to or on the account of the said [*mortgagor*], his executors, administrators, or assigns, in pursuance of the agreement hereinbefore contained, with interest thereon as aforesaid, notwithstanding that the said period of six calendar months from the time of the advancement of the same shall not then have arrived in respect of some part or parts of the said monies [*a*]: and then to pay the residue (if any) of the said monies which shall come to his or their hands by virtue of the trusts hereinbefore contained, unto the said [*mortgagor*], his executors, administrators, or assigns: PROVIDED NEVERTHELESS, and it is hereby declared, that the principal money to be ultimately recoverable by means of this security (excepting the costs and expenses to be incurred in such fire-insurance or fire-insurances as aforesaid) shall not exceed the sum of 1000*l.*: PROVIDED ALSO, and it is hereby further declared, that every receipt which shall be given by the said [*mortgagee*], his executors, administrators, or assigns, to the purchaser or purchasers of the said premises, for his, her, or their purchase-money, or

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[*a*] As the power of sale is exercisable in default of payment of *any* part of the monies secured, and at the time of the prepayment of the first instalment the six months allowed for the payment of the others may not have arrived, it seems to be proper to introduce a provision to this effect.

any part thereof, shall effectually discharge such purchaser or purchasers from all responsibility in respect of the application of the same; *And* that every sale which shall be made, and assignment which shall be executed by the said [*mortgagee*], his executors, administrators, or assigns, shall be binding on the said [*mortgagor*], his executors, administrators, and assigns; and that the purchaser or purchasers of the said premises shall not be obliged to inquire whether any sale or sales is or are necessary or proper for any of the purposes hereinbefore expressed, nor shall be affected by express notice that such sale or sales is or are unnecessary or improper: PROVIDED ALSO, and it is hereby declared, that the power of sale hereinbefore contained shall not prejudice the right of the said [*mortgagee*], his executors, administrators, or assigns, to proceed to a foreclosure of the equity or right of redemption of the said premises, or otherwise abridge or affect his or their rights and remedies as a mortgagee or mortgagees thereof(*c*):

BUILDER'S MORTGAGE BY ASSIGNMENT.

Sale to be binding on mortgagor.

Mortgagor's right of foreclosure not to be prejudiced.

(*c*) In *Ex parte Hodgson*, 1 Glyn & Jam. 12, a mortgagee with a power of sale applied by petition (the mortgagor having become bankrupt) for an order for the sale of the property, which was resisted by the assignees, on the ground that the order was unnecessary, as the petitioner might sell without the assistance of the Court: but the Vice-Chancellor was of opinion that the mortgagee might waive the power of sale in the deed, and come for an order for sale in his general character of mortgagee. Application was then made that the petitioner might be at liberty to bid at the sale, which his Honour allowed, provided the sale was before the commissioners, and conducted by the assignees. The Vice-Chancellor, however, refused an application by the assignees to be allowed to bid in their private character, observing, that he would never make such an order without very special circumstances.

Mortgagee with power of sale may apply for order to sell under a bankruptcy.

Assignees not allowed to bid.

On another occasion, his Honour required the previous consent of the creditors, before he acceded to the petition of an assignee to be allowed to purchase, though offering 30*l.* more than had been bid at an auction at which the premises had been put up for sale. *Ex parte Bage*, 4 Madd. 459.

And here, it may be observed, that a mortgagee with a power of sale is under the same disability to purchase the mortgaged estate that attaches to all persons clothed with a fiduciary character, to become the buyers of the property, of which, by virtue of the trust, they are themselves the vendors, or, in other words, to sell to themselves. The propriety of such

Trustee for sale cannot sell to himself.

Covenants by mortgagor.

AND THE SAID [*mortgagor*] doth hereby for himself, his heirs, executors, and administrators, covenant with the

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Grounds of the rule.

a rule is obvious. Nothing could be more dangerous than to permit trustees to place themselves in a situation in which their own personal interest is at direct variance with the duties of their office. As sellers, it is their *duty*, on behalf of those whom they represent, to obtain as large a price as possible; as purchasers, it is their *interest* to buy at the lowest price. To prevent, therefore, this conflict of duty and interest, the general doctrine in question declares, that, though the full value has been given for the estate, and the sale has been made by auction, and conducted with the utmost publicity and fairness, yet, being a purchase by a trustee from himself, it shall not stand. Thus, in the late case of *Downes* v. *Grazebrook*, 3 Mer. 200, where A., in order to secure the re-investment of certain stock lent to him by B., and the payment of sums equal to the dividends in the meantime, conveyed an estate to B., upon trust for A. until default, and after default upon trust to sell by public auction or private contract, and out of the produce, in the first place, to re-imburse himself all expenses, and next, to repurchase the same amount of stock in his own name, and retain to himself all dividends and interest to which he would have been entitled if the stock had remained unsold. Default being made by A. in re-investing the stock and paying the dividends at the time fixed, (and also on other days subsequently fixed by other securities taken by B. for the mortgage debt), B. proceeded to a sale of the estate by public auction, with A.'s knowledge, and after a previous consultation with A.'s attorney, who recommended the auctioneer. At this sale, a person attended and bid for the estate, and there being no other bidder (which was to be imputed, it seemed, principally to the conduct of A., who sent a person to the auction declaring her non-concurrence in the sale), the estate was knocked down to him; and, as it turned out that this purchase was made on behalf of B., Lord *Eldon* set aside the sale, observing, that *although there was not the slightest ground for imputing to B. either fraud, oppression, or harshness of conduct towards A., yet that, consistently with the general rule, the sale could not stand.*

Purchase by auction by a trustee set aside, though no proof of unfairness.

And though there are other acting trustees.

The principle in question has been applied in many earlier cases, as well where the purchase was made by one of several trustees, (the other trustees interfering in the sale), as where the purchaser was the only, or the only acting trustee. Thus, in *Whelpdale* v. *Cookson*, 1 Ves. sen. 9, (more fully stated in Belt's Supplement, 9), where lands devised in trust for sale, for payment of debts, were put up to auction by the trustees, and a certain sum having been bid, a person on behalf of one of the trustees advanced on this bidding, and no higher bidding being made, he was declared the purchaser; the property was then conveyed by the trustees to

said [*mortgagee*], his executors, administrators, and assigns, That he the said [*mortgagor*], his executors, administrators,

BUILDER'S MORTGAGE BY ASSIGNMENT.

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this person, who afterwards conveyed to the trustee for whom he made the purchase. On a bill filed by one of the testator's creditors, Lord *Hardwicke* held, that the purchase could not stand, and directed, if a majority* of the creditors of the testator elected before the Master, that the premises should be put up to a sale again, they should be re-sold. It appeared in this case, that the trustee had expended monies in improvements, and Lord *Hardwicke* directed that he should be re-imbursed these monies, and his purchase-money, with interest at 4 *per cent.*

So, in *Whichcote* v. *Lawrence*, 3 Ves. 740, Lord *Rosslyn*, at the instance of creditors, set aside a purchase made by one of five trustees for sale, for payment of debts: in this case the sale was by auction, at which several of the trustees attended; the purchasing trustee, six years afterwards, resold at a great profit, and he was decreed to account for this profit to the creditors. Again, in *Campbell* v. *Walker*, 5 Ves. 678, Sir *R. P. Arden*, M. R., decreed a purchase at a sale by auction on behalf of one of two devisees in trust for sale, to be void, though it appeared that the sale was fair and open, had been duly advertised, and there were several bidders, and it was declared immediately afterwards who was the purchaser, though the biddings at the time were not avowedly made on his behalf. It was proved that the trustees had endeavoured to prevail on the tenant of the principal estate to purchase it, and at a previous sale had bought it in at a price less than that which the purchasing trustee gave for it. The case afterwards came before Lord *Eldon* on the Master's report, and his Lordship gave costs (which had been reserved by the former decree,) against the trustee. *Sanderson* v. *Walker*, 13 Ves. 601. In this case the Master of the Rolls laid down the rule broadly, that no trustee could in any case purchase without being liable to have the sale opened by the *cestui que trust*, unless the purchase were made under the sanction of the Court, which, he observed, would give permission for the trustee to purchase, if the interest of the *cestui que trust* required it. And his Honour referred to a case of *Price* v. *Byrn*, in which the *cestuis que trust* wanted to impeach a sale of ground-rents made twenty-years before: and though, on account of the length of time, he refused to set it aside, yet he thought he should have done so, if it had been impeached in a reasonable time, though ground-rents were a species of property in which there could be no concealment as to the value, the question being

As to the purchase of ground-rents.

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* But as to this part of the decree see 6 Ves. 628, where Lord *Eldon* intimated an opinion, that the majority of the creditors could not in such a case bind the minority.

To pay principal sums and interest.

or assigns, will pay unto the said [*mortgagee*], his executors, administrators, or assigns, the said sum of 200*l.* already

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simply, how many years' purchase they are worth*. In exact consistency with the principle of the preceding cases it was lately held, that it was a valid objection to a title of part of the glebe lands of a rectory, which had been sold by the rector under the power in the act for the redemption of the land tax†, that the rector himself was the real purchaser. *Grover* v. *Hugell*, 3 Russ. 428.

As to purchases by trustees who have only a dry legal estate.

The objection to a purchase by a trustee loses much of its force where he is not a trustee for sale, but is simply the owner of a dry legal estate. In such a case the proposition, that a trustee cannot sell to himself, or in other words that he cannot exercise the functions of his office for his own benefit, has no application, where the disposition of the property is not within the scope of those functions.

The point is of some importance in practice, for it frequently happens that, on the face of an abstract of title, a purchase appears to have been made by a dower trustee, a trustee to preserve contingent remainders, or the trustee of a term attendant on the inheritance. The Editor is not aware of any case in which an attempt has been made to open a purchase by a trustee of this description, except in that of *Parkes* v. *White*, 11 Ves. 209; the circumstances of which present a strong instance of flagrant dereliction of duty on the part of a trustee, and deserve attention. They were shortly as follow:—On the marriage of A. in 1778, lands were limited to the use (after the marriage) of A. for life, and after the determination of that estate to the use of B. (the trustee in question) and his heirs, upon trust to preserve contingent remainders, and for the separate use of A., with remainder to the use of B. in fee, in trust for such persons as A. should, notwithstanding her intended coverture, by will appoint, and in default of appointment to the children of the marriage. In 1785, B., the trustee, in the name of a third person whom the Court identified with himself in the transaction, purchased from A. and her husband the entire fee-simple, for a large sum of money, procuring them to levy a fine of her life estate, and also inducing A. to exercise her power by making a will appointing the reversion in fee to him (the nominal purchaser) to whom the husband at the same time gave a bond of indemnity against the acts of any person claiming under the wife's power. A few months afterwards the nominal purchaser conveyed the estate, professedly for a pecuniary consideration, to B., who in 1793 sold and conveyed it to C., in whose favour A. executed another testamentary appointment, receiving at the same time a farther sum from B., on account of his having sold the estate to C. to advantage.

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* But not so if there is a beneficial reversion.

† *Vide* stat. 42 Geo. 3, c. 116, s. 79, stated *ante*, Vol. 3, p. 408, 2nd ed.

advanced, and such other sum or sums of money as shall be advanced by the said [*mortgagee*], his executors, ad- BUILDER'S MORTGAGE BY ASSIGNMENT.

On a bill filed by A. against B. and C. the Court decreed that both the wills should be delivered up to be cancelled, and the remainder in fee expectant on A.'s life estate conveyed to new trustees, upon the trusts of the settlement.

This decree, it will be observed, did not disturb the defendant's purchase as to the estate for life; so that the case stands as one in which the purchase of an estate for life by the trustee of contingent remainders depending on that estate was supported; but, inasmuch as the sum received by the plaintiff for the purchase of the fee must have greatly exceeded the value of such life estate, the plaintiff did not offer to repay such sum and take a reconveyance of the life estate, which of course she could have obtained on no other terms; so that the applicability of the principle was not fairly put to the test. If the trustee of a dry legal estate, who has purchased the interest of the *cestui que trust*, appears at a subsequent period to have sold at an advance of price, it is presumed that the transaction, unless rendered unimpeachable by length of time, would constitute a valid objection to the title. Observations on *Parke* v. *White*.

Length of time, it seems, is no bar to the remedy of the *cestui que trust*, unless it be proved that he was acquainted with the fact of the purchase having been made by the trustee; and therefore, in a late case, where A. conveyed to E. and L. certain estates in trust, to sell and pay mortgage and other debts; and, in 1779, part of the property was purchased by H., in trust for E.; and in 1780 other part was purchased by H. in trust for E. and L.; in both which cases, A. joined in the conveyance to H., but the trust did not appear on the face of the deeds. In 1801, a bill was filed by the representatives of A., to set aside the purchases; and Sir *Wm. Grant*, though he admitted the disinclination of the Court to unravel old transactions, was of opinion, that, as it did not appear that A. was aware of the trustees being the real purchasers, his acquiescence did not bar him, and the sale must be opened. *Randall* v. *Errington*, 10 Ves. 423. In the case of *York Buildings Co.* v. *M'Kenzie*, 8 B. P. C., Toml. ed. 42, the sale was set aside after an interval of eleven years: but in *Gregory* v. *Gregory*, Coop. 201, Sir *W. Grant* refused to interfere, on account of eighteen years having been suffered to elapse, after disabilities removed, before the filing of the bill. See also *Chalmer* v. *Bradley*, 1 Jac. & Walk. 59. In a late case, a purchase by an executor of canal shares, the property of the testator, was set aside after a period of sixteen years, on the ground that the purchase was made under circumstances of concealment. The executor, who was treasurer to the canal company, professedly sold the shares in 1790, to two strangers, for the purpose of paying a debt owing Effect of acquiescence. Purchase by executor set aside after sixteen years, on account of concealment.

BUILDER'S MORTGAGE BY ASSIGNMENT.

ministrators, or assigns, to or on the account of the said [*mortgagor*], his executors, administrators, or assigns, as

by the testator; and these persons, at the end of a year, declared themselves to be trustees for him. The executor had debited himself with the amount of the purchase-money, but the debt, for the payment of which the money was raised, at this period remained unpaid. The plaintiff was devisee in remainder, subject to an estate for life of his mother of real estate, in the purchase of which the personalty was to be invested, and attained his age in 1803. In 1806, he filed this bill to set aside the purchase. It was objected that the plaintiff's father (whose wife was tenant for life) was at the time acquainted with the transaction, and that the Court would not, under such circumstances, relieve against a purchase by the executor, after so great a length of time. Sir J. *Leach*, V. C., "If an executor, ignorant of the rule of this Court, openly purchased assets of his testator, with the full approbation of the parties then presently interested, the Court would not in that case press the equitable rule against him, after such a length of time. But in this case the transaction was concealed and disguised in a manner that imported fraudulent intentions; and admitting the father to have been acquainted with the real circumstances, his knowledge and approbation of the transaction cannot conclude either the mother or the son." The shares were decreed to be sold, and the dividends, from the death of the father, to be accounted for, giving credit for the price paid and interest. *Watson* v. *Toone*, 6 Madd. 153. (As to delay in impeaching the sale of a reversion, see *Wheldale* v. *Wheldale*, 3 Bligh, 1).

[*333]

Colourable sale to a third person unavailing.

The scheme of conveying the property to a third person as the apparent purchaser, and for such person immediately, or after a decent interval, to convey to the trustee, for a pecuniary consideration, generally the same as that which was given by the nominal purchaser, has frequently been unsuccessfully tried. Thus, in the late case of *Cook* v. *Collingridge*, Jac. 607, where the executors of a trader sold his share in a partnership trade to the surviving partners, for a sum which had been fixed as its value by two appraisers, one chosen on each side; and the next day they for the same sum assigned the share to one of the executors: inasmuch as the transaction, though fair, was evidently from the first a sale to the executor, Lord *Eldon* set aside the sale, and directed the Master to take an account of the profits (as still belonging to the estate), and also of the sums paid by the executor; on which his Lordship was disposed to allow him interest at 5 *per cent.*, and also a reasonable sum for his services; but these points were reserved. The attempt to disguise the transaction by a feigned sale to a third person always gives to it a complexion much less favourable than if the sale had been open. *Gregory* v. *Gregory*, Coop. 201. See also *Parkes*

aforesaid, and interest thereon, at the several times hereinbefore appointed for the payment thereof respectively;

ASSIGNEE'S MORTGAGE BY ASSIGNMENT.

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v. White, 11 Ves. 209; *Grover* v. *Hugell*, 3 Russ. 428. The circumstance of the purchase being made by the trustee for his children, of course, does not protect it. *Huguenin* v. *Baseley*, 14 Ves. 289; *Gregory* v. *Gregory*, Coop. 201.

Making purchase for trust persons.

It should be observed, that the rule vacating purchases by trustees is never applied, except at the option or for the benefit of the *cestuis que trust*, and cannot be taken advantage of by the trustee himself, in order to get rid of a disadvantageous bargain. If the contract is a bad one, he will be held to it; if beneficial, the benefit will be taken from him. The plan is, to put the estate up for sale at the price which the trustee gave, with the addition of money expended, if any, in substantial improvements; and if a larger sum is bid than such aggregate amount, the property is sold for the benefit of the *cestuis que trust*; if not, the trustee retains it. Thus, in *Ex parte Lacey*, 6 Ves. 625, where the property in question, part of a bankrupt's estate, was twice put up for sale by auction by the assignees: at the first sale the assignee was the purchaser at 420*l.*, another person, bidding *bonâ fide*, having gone up to 415*l.* The assignee having again, some time afterwards, offered the premises for sale by auction, was at the subsequent sale again the purchaser at 375*l.* The solicitor of the commission appeared at the sale bidding for the assignee. Lord *Eldon* declared that he should hold the assignee to the purchase as against himself, but not in his favour; that the premises should be put up again at 375*l.*; if any one should bid more, the assignee should not have them, if not, he should take them; but Lordship reserving his opinion on the question, whether the assignee should be charged with the amount of the difference of the two sales. And the rule has been followed in other cases. See *Ex parte Reynolds*, 5 Ves. 707; *Lister* v. *Lister*, 6 Ves. 631; *Nelthorpe* v. *Pennyman*, 14 Ves. 517; *Robinson* v. *Ridley*, 6 Madd. 2. In *Ex parte Reynolds*, Lord *Eldon* removed assignees, on account of one of them having purchased the bankrupt's estate. In *Ex parte Morgan*, 12 Ves. 6, where an assignee purchased part of the bankrupt's estate, at a sale by auction, and afterwards sold it at a profit of 250*l.*, Lord *Erskine* held him to be a trustee for the sum: in the first instance for an equitable mortgagee, who gave up the deeds upon the first sale, but whose debt had not been wholly satisfied out of the purchase-money, and next for the general creditors.

Trustee not to a purchase of disadvantageous to him.

Purchase by assignee of bankrupt, set aside.

The proper course for an assignee, who wishes to purchase, is to obtain the previous consent of the creditors, at a meeting convened for the purpose, and then, if the assignee makes an offer which is clearly beneficial to the estate, it seems that an order permitting the sale will be granted. *Vide ante*, p. 329.

That he hath right to assign.

And that the said [*mortgagor*] now hath in himself good right and full power to assign the said premises in man-

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Trustee not precluded from buying of *cestui que trust*.

The rule, it has often been observed, is not, that a trustee cannot buy from his *cestui que trust*, but, that he shall not buy from himself, and thereby be enabled to make use of the information acquired by him in the character of trustee, for his own benefit. He is not, however, precluded from dealing with the *cestui que trust*, if the latter choose to regard the relation of trustee and *cestui que trust* as dissolved, and to treat with him in a distinct character.

Case of *Coles* v. *Trecothick*.

Thus, in the case of *Coles* v. *Trecothick*, 9 Ves. 234, (which is a leading case on the doctrine under discussion), A. proposing to convey all his estates at B., to C. and D., in trust to sell for the payment of his debts; by an agreement in writing indorsed, by way of defeazance, on a warrant of attorney given by A. to certain creditors, it was declared that execution should not issue for two months, upon condition that A. should, within one month, make out his title to the B. estate, and within the remaining month convey the same to C. and D. in trust to sell and pay off incumbrances and certain bonds, of some of which C. and his father H., as partners, were holders. No conveyance was executed, but preparations were made for the sale, and the estates were, with the approbation of the trustees, surveyed and valued by S., an auctioneer, *under the sole direction of A.*, who fixed the *minimum* price at which the estate was to be sold. There being no bidder, the estate was divided into lots and again offered for sale, still under the exclusive management of A., the trustees not interfering; and lot one (the property in question), was bought in by his direction for 19,350*l.*; various sales of other lots were made by S., under the authority given to him by A. At a meeting, subsequently to the sale, for the purpose of determining what was to be done with the unsold lots, the solicitor who conducted the sale, declared that A. had desired im to offer lot one to C., or his father, for 20,000*l.*, and was very desirous that one of them should be the purchaser. The trustees not being present, their solicitor replied, that C. could not, as standing in the character of trustee, and would not, become the purchaser, whatever his father, as an indifferent person, might do; observing also, that the price proposed was more by 500*l.* than it would have been sold for; to which A.'s solicitor assented, but said that A. thought it was worth more. A few weeks afterwards, C. in-

[*335] formed S. and A.'s solicitor, that his father agreed to take the *lot at 20,000*l.*; when the solicitor expressed A.'s wish to reserve the advowson and some other things, and abate 4,000*l.*: C. said, he was sure his father would not purchase any thing short of the whole, and A. must make up his mind, whether to part with it or not; and said, he would call again for his final answer. Soon afterwards, S. was offered 20,000*l.* by Y., an auctioneer,

ner aforesaid, according to the true intent and meaning of these presents; *And also,* that if default shall be made in

For quiet enjoyment after default.

of which A. was informed. A. finding that neither Y. nor H. would buy if the lot was divided, gave up that intention, and agreed that it should be sold entire for 20,000*l*; and S. asking whether H. or Y. was to have it, A. desired him to do as he pleased. S. said, "Then, sir, it is H.'s;" and A. replied, "Then, let H. have it." The same afternoon, C. called on S., and being informed of what had passed, and being asked if H. was to be considered the purchaser, answered: "Certainly," and that he should send H.'s solicitor immediately, who accordingly called that evening, when an agreement was written on one of the particulars by S.'s clerk, and signed by him as agent for the seller. A deposit was paid to him by H.'s solicitor. A few days afterwards A. applied to C., expressing his wish that H. would give up his purchase, as Y. had offered 25,000*l*. for the lot; but H. refused, and now filed a bill against A. to enforce the performance of the contract. Lord *Eldon* was of opinion, that this being a *bonâ fide* sale by a *cestui que trust*, taking the whole execution of the trust upon himself, making surveys, settling the places, modes of sale, and prices, and with all the knowledge as to the value which the trustees possessed, constituted a case of exception to the general principle; and therefore decreed the specific performance of the contract.

Trustees incapable of acting as agents for purchasers.

In this case, it will be observed, the trustee purchased as agent for his father and not for himself. But Lord *Eldon* considered that this made no difference, for a trustee was under the same disability to contract as the agent of another as for himself. So, in the previous case of *Twining* v. *Morrice*, 2 B. C. C. 326, Sir *Lloyd Kenyon*, M. R., refused the specific performance of a contract for purchase, because the agent of the vendors, who were executors, was concerned as agent for the purchaser in bidding for the estate.

Upon the same principle, Lord *Eldon*, in *Ex parte Bennett*, 10 Ves. 381, set aside a purchase of part of a bankrupt's estate, because the solicitor to the commission acted as the agent of the purchaser in bidding for the estate. See also *Downes* v. *Grazebrook*, 3 Mer. 209.

Where *cestui que trust* sells, there must be no concealment on the part of the purchasing trustee.

But even where the purchase is made from the *cestui que trust*, it is essential, to support the transaction, that there should be (according to Lord *Eldon's* own words, 9 Ves. 247) "no fraud, no concealment, no advantage taken by the trustee, of information acquired by him in the character of trustee;" and the non-disclosure of the fact of the purchase being made on behalf of the trustee, would unquestionably be a ground for setting it aside.

In *Fox* v. *Mackreth*, 2 B. C. C. 400, (where the general doctrine un-

BUILDER'S MORTGAGE BY ASSIGNMENT.

the performance of the proviso for redemption hereinbefore contained, it shall be lawful for the said [*mortgagee*],

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derwent much discussion), Sir *R. P. Arden* set aside a purchase which had been made by a person to whom the estates in question had been conveyed jointly with another person, in trust for sale, for paying debts and redeeming certain annuities, (the trustee himself being also a mortgagee), though the contract was entered into by the owner himself, and after much discussion of the terms; his Honor being of opinion that undue advantage had been taken of the confidence placed in the trustee. And this decree was affirmed by Lord *Thurlow*, and afterwards by the House of Lords. In this case the trustee had, in the interval between the contract and the conveyance, resold the property at a profit of upwards of 10,000*l.*, and he was held to be a trustee for the mortgagor in respect of this sum.

Circumstance of profit having been made, not requisite to impeach a purchase by a trustee.

In *Whichcote* v. *Lawrence*, 3 Ves. 740, Lord *Rosslyn* appears to have founded his determination on the circumstance of profit having been subsequently made by the trustees; but, in later cases, the general rule has been placed upon a broader basis, and has been unsparingly applied at the option of the *cestui que trust*, whenever the union of the character of buyer and seller in the same person could be proved, without regard to the fact of the bargain being fair or unfair, advantageous or disadvantageous; and, besides, the circumstance that a profit has been made by the trustee in a subsequent sale, proves nothing as to the unfairness of the original bargain, (though it generally forms the motive for attempting to impeach it), since the estate may have risen in value, or a purchaser may have been found who would give an extraordinary price, *pretium affectionis*. On the other hand, the fact that the trustee has made no advantage by the contract, is equally inconclusive as evidence of the full value having been given. In short, to refer again to the language of Lord *Eldon*, in *Ex parte Lacey*, 6 Ves. 627, "whether the trustee makes advantage or not, *if the connection* (between him and the *cestuis que trust*) *does not satisfactorily appear to have been dissolved*†, *(before the contract is entered into)*, it is in the choice of the *cestuis que trust*, whether they will take back the property or not."

Trustee allowed monies expended in substantial improvements.

But the Court, we have seen, will allow the trustee monies expended in substantial improvements. *Whelpdale* v. *Cookson*, 1 Ves. senr. 9; Belt's Supp. 9; *Ex parte Hughes*, 6 Ves. 617. And this expenditure, in the case of the *York Buildings Comp.* and *M'Kenzie*, 8 B. P. C. Toml. ed. 42,

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† By this his Lordship must not be understood to mean a formal or technical renunciation of the trust, but a substantial and virtual abandonment of the fiduciary character *pro hâc vice*.

his executors, administrators, or assigns, to enter into and to hold and enjoy the premises for all the term and interest

BUILDER'S MORTGAGE BY ASSIGNMENT.

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comprised the erection of a mansion-house, and other costly improvements. In estimating the improvements, old buildings pulled down, if incapable of repair, are to be valued as old materials; but otherwise as buildings standing. *Robinson* v. *Ridley*, 6 Madd. 2.

Purchasers claiming under trustees who have purchased, how far chargeable.

We have seen, that where a trustee has made a purchase which the Court will not permit to stand, it will consider him as still holding the property in trust for the parties beneficially entitled, or, if he has sold again to advantage, will give to those parties the benefit arising from the second sale; and, commonly, the object of the persons impeaching the sale has been simply to recover against the trustee the profit so made, leaving the purchaser's enjoyment untouched. It is in the option, however, of the *cestui que trust*, in such cases, to proceed for the recovery of the estate itself, if it has fallen into the hands of a purchaser *with notice of the trustee's purchase*, and such notice will always be contained in the deeds of conveyance, if they truly represent the transaction. In the late case of the *Attorney-General* v. Lord *Dudley*, Coop. 146, where it appeared that, in 1782, A., by deed enrolled, assigned to B. and S., and several other persons, the premises in question for five hundred years, upon trust for the society of Anabaptists, or particular Baptists, in Dudley. In 1787, the society having contracted debts to the amount of 300*l.*, put up the premises to sale, when B. and S. became the purchasers, at the price of 300*l.* In 1791, B. and S. assigned to H., upon trust by sale to pay himself and another creditor the sum of 300*l.* each, with interest. In 1795, H. sold the premises for 911*l.*, except some small parcels which he sold to several other persons. In 1803, Lord D., the defendant, became the purchaser for about 5,000*l.*, and notice was proved against him of B. and S., *who had purchased the property, being trustees.* An information and bill were filed in behalf of the charity in 1809, praying that the defendants might be declared trustees, as having purchased under trustees, who had themselves bought the property. Sir *Wm. Grant*, M. R., decreed accordingly, but, considering the length of time, without costs. In *Randall* v. *Errington*, 10 Ves. 423, a purchaser from the trustee was made defendant; but, as the case was not pressed against him, it is probable that notice could not be proved. See also *Parkes* v. *White*, 11 Ves. 209, *ante*, p. 332.

Cestui que trust recovering the property, must return principal money received and interest.

Where a person claims to recover an estate which has been sold to a trustee, he must repay the sum he has received, with interest, which seems in some instances to have been 4*l.* *Whelpdale* v. *Cookson*, 1 Ves. sen. 9, and in others 5*l. per cent.*; *Cook* v. *Collingridge*, Jac. 607; see also *Donovan* v. *Fricker*, Jac. 165. And it should seem, that, if the property has

BUILDER'S MORTGAGE BY ASSIGNMENT.

therein respectively hereby assigned, without any interruption of, from, or by any person or persons whomsoever:

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been in the actual occupation of the defendant, the Master will be directed to set an occupation rent upon it, and annual rests will be made, thereby giving the *cestui que trust* interest on the excess of the rent above the interest; though it seems doubtful whether interest would be allowed on the entire rent, when its excess from time to time had wholly liquidated the principal, so that there was nothing to set off against it. *Donovan* v. *Fricker*, Jac. 165. This was an instance of an alleged purchase made by a stranger, which was set aside for fraud, and not a purchase by a trustee; but the principle seems to be the same.

Incapacity to purchase extends to all persons confidentially concerned for the vendor.

It remains to be observed, that the incapacity to purchase extends itself to every person clothed with a confidential character, and whose duty requires him to effect as advantageous a sale as possible. Thus, in the case of the *York Buildings' Company* v. *Mackenzie*, 8 B. P. C. Toml. ed. 42, (which has always been considered a leading case), a purchase was set aside, which had been made by a common agent or solicitor in Court in Scotland, of estates of an insolvent company, sold by the Court of Session under the authority of general statutes and a special act of Parliament, which purchase had been openly made at a public judicial auction. So,

Agent employed to sell.

[*338]

*in *Crowe* v. *Ballard*, 3 B. C. C. 120, where an agent employed to sell a reversionary legacy secretly purchased it himself, and had it assigned to a nominal purchaser, Lord *Thurlow* set aside the purchase. See also *Whitcomb* v. *Minchin*, 5 Madd. 91. Again, in *Ex parte James*, 8 Ves. 337, Lord *Eldon* decreed against a purchase made by the solicitor to a commission, of part of the bankrupt's estate, though it was made publicly at an auction, at which many of the creditors were present, and urged him to bid; and his Lordship expressed his conviction of the moral propriety of the transaction. See also *Ex parte Bennett*, 10 Ves. 381. But (in conformity to the rule already stated with regard to trustees), a solicitor, who has improperly purchased an estate which he was professionally employed to sell, cannot himself avoid the bargain; and in the case of *Nelthorpe* v. *Pennyman*, 14 Ves. 517, where, on a sale before the Master, the solicitor in the cause had purchased some lots to prevent a sale at an undervalue, Lord *Eldon* refused to discharge him from his contract, on being informed that there was no higher bidding; his Lordship observing that it would be a very wholesome rule to lay down, that the solicitor in the cause should have nothing to do with the sale, as the certain effect of a bidding by the solicitor in the cause is, that the sale is immediately chilled. In *Gibson* v. *Jeyes*, 6 Ves. 266, Lord *Eldon* set aside the sale of an annuity by a solicitor to his client, an infirm imbecile old lady, on the ground that his duty to her, under the circumstance

Solicitor to a bankrupt's estate.

Sale by solicitor to client set aside.

And that free and clear of and from all and all manner of incumbrances whatsoever (except the rents and covenants

Free from incumbrances, except the rents

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of her situation, required that he should give her his most vigilant care and advice; and his own interest in this transaction was adverse to his discharge of that duty. See also *Wood* v. *Downes*, 18 Ves. 120; *Montesquieu* v. *Sandys*, Ib. 302; *Robinson* v. *Bidley*, 6 Madd. 2; *Lees* v. *Nuttall*, 1 Russ. & M. 53. In all the preceding cases except one, where advantage was taken of mental imbecility, the solicitor, whose purchase was set aside, was professionally concerned in selling; and therefore they fell directly within the principle, which prohibits purchases by persons standing in the inconsistent relation of seller and buyer at one and the same time. But it is not to be inferred from these cases that a solicitor is under any general incapacity to purchase from his client: Thus, in a late case, in the House of Lords (reversing a decree of the Irish Exchequer), the specific performance of a contract was decreed, which had been resisted on the ground that an attorney could not purchase from his client. Lord *Eldon*, however, thought, that the purchaser was not concerned for the vendor, in this instance, as his solicitor, so as to sustain the objection, *if it was capable of being sustained;* but his Lordship declared that there was no such doctrine "that an attorney could not deal with his client. If the attorney were employed to sell, if he dealt for the property, he must put an end to the confidential relation, or put himself completely at arm's length: or, if the contract was afterwards quarrelled with, it would be incumbent upon him to shew that he had made a reasonable use of that confidence, and had given as ample and correct advice to his client, as he would have done if his client had been dealing with a third person. He conceived also, that, if an attorney were employed as agent of a landed estate, he could not deal with the principal for that estate, without honestly communicating to the principal all the knowledge respecting its value which he had acquired as his agent; and unless he did this, the contract, if questioned, could not be supported. But, independently of these particular circumstances, an attorney did not stand exactly in the situation of a trustee. The general rule that a trustee to sell could not purchase the trust estate, was now pretty well settled, *but there was no such rule with respect to an attorney*." In this view of *the case Lord *Redesdale* concurred. *Cane* v. *Allen*, 2 Dow, 289. And it has been decided that a creditor suing out an execution is not incapacitated from purchasing property sold under it, as the sale is made by the sheriff and not by the creditor. *Stratford* v. *Twynam*, Jacob's Rep. 418. Nor is a tenant for life, whose consent to the sale is requisite by the terms of a power, incompetent to purchase; *Howard* v. *Ducane*, 1 Turn. & Russ. 81; nor a trustee who has renounced, *Mackintosh* v. *Barber*, 1

No general rule that an attorney cannot purchase from his client.

[*339]

Creditor may purchase under his own execution.

Tenant for life.

Trustee who has renounced.

BUILDER'S MORTGAGE BY ASSIGNMENT.

and covenants of lease.

And for further assurance.

reserved and contained by and in the said hereinbefore in part recited indenture, which, on the lessee's part, ought henceforth to be paid and performed): *And further*, that he the said [*mortgagor*], and every other person whosoever lawfully claiming any estate, charge, or interest, in, to, or out of the said premises (except the person or persons claiming in respect of the rent and covenants hereinbefore excepted), will at all times hereafter, upon the request of the said [*mortgagee*], his executors, administrators, or assigns, but at the costs of the said [*mortgagor*], his heirs, executors, or administrators, until the said premises shall have been sold and assigned under the power hereinbefore contained, and, after such sale and assignment, then at the costs of the purchaser or purchasers, his or her executors, administrators, or assigns, execute, or procure to [*340] * be executed, all such further acts and assurances in the law whatsoever, for the more perfectly assuring and confirming the same premises unto the said [*mortgagee*], his executors, administrators, and assigns, as by the said [*mortgagee*], his executors, administrators, or assigns, or his or their counsel learned in the law, shall be reasonably

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Bing. 50, (overruling a position, Co. Litt. 113. a.; Bendl. 14; 1 Jarm. Pow. Dev. 240, n.); nor a mortgage creditor who has an agreement by his debtor to execute a conveyance in trust for sale, but which conveyance has not been executed. *Chambers* v. *Waters*, 3 Sim. 42. And there is no rule of policy prohibiting a steward from taking a lease from his employer, if there has been no improper concealment of information acquired by him in that character. Lord *Selsey* v. *Rhoades*, 2 Sim. & Stu. 41.

Trustee may deal with other legatees, where his office gives him no advantage.

In conclusion, it should be noticed that the doctrine discussed in the present note does not prevent a trustee, who has also a beneficial interest, from dealing with the other *cestui que trust* in regard to such interest, the matter being of such a nature that his office gives him no advantage over the other contracting party; and therefore, where trustees, who were also residuary legatees, entered into an arrangement with an annuity-legatee respecting his claim to have a fund invested in a particular species of security, in relation to which the will was ambiguous, and all the parties were fully aware of their rights, Sir *J. Leach*, V. C., refused to disturb the arrangement; his Honor observing, that *the dealing was in the character of residuary legatee, and it was impossible he could derive any advantage from the character of executor.* *Naylor* v. *Winch*, 1 Sim. & Stu. 555.

BUILDER'S MORTGAGE BY ASSIGNMENT.

required. (*Covenant by mortgagor to keep up policy, and, in default, that mortgagee shall be at liberty to do so, ut ante*, p. 313). And the said [*mortgagor*] doth, for himself, his heirs, executors, and administrators, further covenant with the said [*mortgagee*], his executors, administrators, and assigns, that the rent reserved by the said indenture of the —— day of ——, and the land-tax, and all other rates, assessments, and charges, due and payable for the premises, or any part thereof, previously and up to the —— day of —— last, have been duly paid and discharged by the said [*mortgagor*]; and that the said [*mortgagor*], his executors, administrators, or assigns, will henceforth, during so long of the residue of the said term of —— years as any sum or sums of money shall remain due upon this security, and the said [*mortgagor*], his executors, administrators, or assigns, shall be in the possession of the said leasehold premises, or in the receipt of the rents thereof (*d*), pay the yearly rent by the said indenture of lease reserved, and perform all the covenants and agreements in the said indenture contained, which ought henceforth, on the lessee's part, to be paid and performed (*d*), *And further*, that if the said [*mortgagor*], his executors or administrators, shall not, before the —— day of ——, complete and perfectly finish every part of the buildings hereby assigned, pursuant to his covenant contained in the said recited indenture of lease, then and in such case it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, to enter into and upon the said plot of ground hereby assigned, and to finish and complete the said buildings, according to the true intent and meaning of the said covenant; *And* that he the said [*mortgagor*], his heirs, executors, or ad-*ministrators, will on demand pay unto the said [*mortgagee*], his executors, administrators, or assigns, all and every the sum and sums of money which he or they shall expend therein, with interest thereon at the rate aforesaid from the time of the expenditure thereof; and the plot of ground, messuage, and premises hereby assigned, shall

Covenant by mortgagor, that the rent, &c. has been paid to a certain day.

And henceforth to pay rent, &c.

That if mortgagor shall not finish buildings, mortgagee shall be at liberty to enter and complete them.

That mortgagor will pay mortgagee monies so expended, with interest.

[*341]

(*d*) Observe the difference between this covenant and that in the former precedents, *ante*, pp. 303, 311.

BUILDER'S MORTGAGE BY ASSIGNMENT.

stand and be charged and chargeable with the payment of the same monies and interest, and the same shall and may be raised under the trusts aforesaid, in the same manner as the said principal sum of 200*l.* and interest, and the other monies hereby intended to be secured by virtue of these presents, subject nevertheless to the limitation in amount hereinbefore expressed. *Provided always*, and the said [*mortgagee*], for himself, his heirs, executors, administrators, and assigns, doth hereby covenant with the said [*mortgagor*], his executors, administrators, and assigns, that until default shall be made in the performance of the proviso for redemption hereinbefore contained, it shall be lawful for the said [*mortgagor*], his executors, administrators, or assigns, to enjoy the said premises hereby assigned, and receive the rents thereof without any interruption by the said [*mortgagee*], his executors, administrators, or assigns; and that until such default shall be made, he the said [*mortgagee*], his executors, administrators, or assigns, will not exercise the power of sale hereinbefore contained. But it is hereby declared that the covenants lastly hereinbefore contained, shall not extend to prejudice or affect any purchaser or purchasers of the said premises, although he, she, or they have express notice that the sale or sales made to him or them is or are so made in violation of the same covenants, or one of them. In witness, &c.

Covenant by mortgagee for quiet enjoyment by mortgagor until default;

and not to sell until default.

UNDER-LEASE *with* TRUST *for* SALE, *as an additional Security for a* DEBT ANTECEDENTLY *secured by* BOND, *and to insure the Payment of* RENT *and* PERFORMANCE *of* COVENANTS *of* ORIGINAL LEASE. COVENANTS *by* MORTGAGOR *to pay Rent and* PERFORM *Covenants of original Lease until a Sale; also for Title, and further Assurance specially adapted to the Case of an Under-lease made saleable.* COVENANTS *by Mortgagee, that Money shall remain on Security for seven Years, Interest, Rents, &c. being paid;—by Mortgagor, not to redeem for a certain Period. Declaration negativing implied Warranty of Title by Mortgagor as to Purchasers.*

UNDER-LEASE WITH TRUST FOR SALE.

THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—, BETWEEN [*mortgagor*], of &c., of the one part; and [*mortgagee*], of &c., of the other part. *(Recite lease).* AND WHEREAS, by virtue of divers mesne assignments, the said messuages or tenements and premises became vested in the said [*mortgagor*] for all the residue of the said term of —— years, subject to the rents and to the covenants on the lessee's part by and in the said indenture of lease reserved and contained. AND WHEREAS, by a bond under the hand and seal of the said [*mortgagor*], bearing date the —— day of ——, 18—, he bound himself and his heirs unto the said [*mortgagee*], in the penal sum of £——, subject to the condition thereunder written for making void the same bond, if the said [*mortgagor*], his heirs, executors, or administrators, should pay unto the said [*mortgagee*], his executors, administrators, or assigns, the sum of £——, on the —— day of ——, 18—, and should half yearly, that is to say, on every —— day of ——, and —— day of ——, until the same sum should be paid, pay unto

Parties.

Recital of lease and reference to mesne assignments.

—Of bond from mortgagor to mortgagee.

UNDER-LEASE WITH TRUST FOR SALE.

the said [*mortgagee*], his executors, administrators, or assigns, interest for the same sum at the rate of five pounds for every one hundred pounds by the year, and make such payments clear of all deductions. AND WHEREAS the said principal sum of £——, secured as aforesaid, now remains unpaid, but all interest thereon hath been paid and discharged, up to, and inclusive of, the day of the date of these presents. AND WHEREAS the said [*mortgagee*] hath called upon and requested the said [*mortgagor*] to give him a further security for his said bond debt, which the said [*mortgagor*] hath agreed to do, though the period appointed for the payment of the principal money according to the condition of the said bond, is not yet arrived, and the said [*mortgagee*] hath thereupon agreed to extend the period for the payment of the said principal money secured by the said bond. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the premises, and of ten shillings of lawful money current in Great Britain, to the said [*mortgagor*] in hand paid by the said [*mortgagee*], immediately before the execution thereof (*a*), (the receipt whereof is hereby acknowledged), He the said [*mortgagor*] *Hath* granted, bargained, sold, and demised, and by these presents *Doth* grant, bargain, sell, and demise (*b*) unto

That principal on bond remains unpaid.

Agreement for further security.

Testatum.

Mortgagor demises to mortgagee.

(*a*) As this mortgage is given as an additional security for a debt already secured by a bond subject to the *ad valorem* stamp, no additional *ad valorem* duty becomes payable. See stat. 3 Geo. 4, c. 117, stated *post*, Vol. 6, p. 364.

As to under-leases with trusts for sale.

(*b*) Although, as already observed, where leaseholds are subjected to trusts for sale, it is more usual to make the assurance by way of assignment than under-lease, yet the latter mode appears to have been adopted in the present instance, to avoid the mortgagee's liability to a very large rent, and some onerous covenants. In such a case, the covenants for title, &c. are required to be rather specially framed. As between the mortgagor and mortgagee it is reasonable that the mortgagor should covenant to pay the rents, and perform the covenants of the original lease, and he would, it is clear, be bound to do so under the usual express covenant for quiet enjoyment; and it is apprehended the same obligation would, even without an express covenant, attach to him by the implied warranty resulting from the words of demise (*Vide ante*, Vol. 4, p. 371); which obligation, unless restricted as in the precedent in the text, would extend

UNDER-LEASE WITH TRUST FOR SALE.

the said [*mortgagee*], his executors, administrators, and assigns, ALL AND SINGULAR the messuages or tenements and premises demised by the hereinbefore in part recited indenture of lease of or about the —— day of ——, in the year ——, or therein expressed so to be, with their respective rights, members, and appurtenances; *And* the reversion and reversions, yearly and other rents, issues and profits thereof; Together with all deeds and writings relating to the said messuages or tenements and premises, or any of them, now in the custody or power of the said [*mortgagor*], or which he can obtain or procure without suit at law or in equity; TO HAVE AND TO HOLD the said messuages or tenements and premises hereby assured, or intended so to be, with their appurtenances, unto the said [*mortgagee*], his executors, administrators, and assigns, during all the residue of the said term of —— years, by the hereinbefore mentioned indenture of lease, of or about the —— day of ——, granted, or intended so to be, save and except the last two days of the said term: AND *it is hereby declared* that the said [*mortgagee*], his executors, administrators, and assigns, shall stand possessed of the said premises hereby assured, or intended so to be, *Upon trust*, to permit the said [*mortgagor*], his executors, administrators, or assigns, to receive and take the rents and annual produce thereof for his and their own use, until default shall be made in payment of the whole or any part of the interest of the said principal sum of £——, by the space of one calendar month after any one of the respective days or times whereon the same respectively are appointed to be paid, in and by the condition of the said recited bond, or until default shall be made in the payment of the said principal sum of £——, at the expiration of seven years from the date hereof, or, which shall first happen, until the said [*mortgagor*], his executors, or administrators, shall fail to pay the rent, or to observe or perform the covenants on the lessee's part reserved and contained by and in the said

Premises comprised in lease,

and the reversion, &c.

Habendum.

For the residue of term wanting two days.

Declaration of trusts.

To permit mortgagor to enjoy until default.

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to purchasers from the mortgagee, in opposition to the obvious intention of the parties in such cases. The covenants in the precedent in the text are cautiously prepared, with the view of avoiding these objections.

UNDER-LEASE WITH TRUST FOR SALE.

hereinbefore recited indenture of lease, after such notice as hereinafter mentioned; and *Upon trust* in case of and immediately after such default or failure by the said [*mortgagor*], his executors, or administrators, in any or either of the particulars aforesaid, That then and in every such case, the said [*mortgagee*], his executors, administrators, or assigns, do and shall, if he or they think fit, sell the said premises hereby assured, or intended so to be, or such part or parts thereof as he or they may think proper, unto any person or persons, for the best price or prices in money that can be reasonably obtained for the same, with liberty also to him or them, if he or they shall think fit, to buy in the same premises, or any part thereof, at any public sale, and to sell at any future public sale, or by private contract, the hereditaments so bought in, without being liable for any loss to be thereby occasioned, and do and shall make and execute all such assignments and assurances of the premises so sold, as shall be requisite or expedient for the completion of such sale or sales: And do and shall stand possessed of the monies to arise by the sale or sales aforesaid, and also of such rents, issues, and profits (if any) of the premises hereby assured, or intended so to be, as may arise after the same shall have become liable to be sold as aforesaid, until such sale or sales thereof shall be made, *Upon trust* therewith and thereout, in the first place, to pay all such costs, damages, and expenses as he or they shall sustain, or be put unto, in and about preparing for or making and completing such sale or sales as aforesaid, or otherwise, in the execution of the trusts hereby in him and them reposed, or any matter or thing relating thereto, or in preserving the said premises from forfeiture, by paying the rent or performing the covenants on the lessee's part reserved and contained by and in the hereinbefore recited indenture of lease, with interest on all such costs, charges, damages, and expenses, at the rate of five pounds *per cent. per annum*, from the time or respective times of the expenditure thereof; *And* in the next place to pay or retain unto himself and themselves, the said [*mortgagee*], his executors, administrators, or assigns, the said principal sum of £—— and interest, or so much thereof as shall not have been theretofore paid,

To sell after default in payment of principal or interest, or in performance of covenants in lease.

With liberty to buy in at any auction.

Declaration of trust as to purchase-money.

To pay expenses of sale and perform covenants of lease.

UNDER-LEASE WITH TRUST FOR SALE.

whether the time for the payment of the said principal sum shall have arrived or not, according to the condition of the said recited bond, or the covenant hereinafter contained in that behalf, together with such of the premiums and expenses of insurance hereinafter covenanted to be paid to him or them as may then remain due to him or them, with interest thereon at the rate aforesaid, and *Upon trust* to pay the residue, (if any) of the said purchase-monies, rents, issues, and profits to arise and be received as aforesaid, unto the said [*mortgagor*], his executors, administrators, or assigns. AND *it is hereby declared*, that, after full payment of the said principal sum of £——, and the interest thereof, and of all such costs, damages, and expenses, and premiums and expenses of insurance, and interest as aforesaid, Then the said premises hereby assured or intended so to be, or so much thereof (if any) as shall not have been disposed of under the trusts hereinbefore declared, shall be in trust for the said [*mortgagor*], his executors, administrators, and assigns, and be at his or their costs assigned as he and they shall lawfully direct; *And also*, that every contract, sale, assignment, assurance, act, deed, matter, and thing, which shall be entered into, made, done, or executed by the said [*mortgagee*], his executors, administrators, or assigns, of or concerning the said premises hereby assured or expressed so to be, or any part thereof, shall to all intents be valid both at law and in equity, though the said [*mortgagor*], his executors, administrators, or assigns, shall not execute the same, join therein, or assent thereto; *And further*, that every receipt in writing under the hand or hands of the said [*mortgagee*], his executors, administrators, or assigns, for any purchase-monies, rents, profits, or produce of the said premises hereby assured, or intended so to be, or any part thereof, shall be a sufficient discharge for the sum or sums of money therein acknowledged to be received unto the person or respective persons paying the same monies; and that such person or persons shall not, after obtaining such receipt or receipts for the same, be obliged to see to the application, or be answerable for the loss, misapplication, or non-application thereof, or be obliged to inquire into the necessity or pro-

Declaration as to premises unsold.

That every contract and sale shall be binding on mortgagor.

That persons paying monies shall not be bound to see to the application thereof.

UNDER-LEASE WITH TRUST FOR SALE.

priety of any sale or sales, or collection of rents and profits under the trusts aforesaid, or be affected by express notice that such sale or sales is or are unnecessary and improper; *And it is hereby declared*, that the total amount of the principal monies which shall be recoverable under the trusts of these presents, (exclusive of the expenses to be incurred in and about any fire-insurance or insurances), shall not exceed the sum of £——(*c*). And the said [*mortgagor*] doth hereby for himself, his heirs, executors, and administrators, covenant with the said [*mortgagee*], his executors, administrators, and assigns, in manner following, (that is to say), That the hereinbefore recited indenture of lease of or about the —— day of ——, is on the day of the date of these presents a good, valid, and subsisting lease, both at law and in equity, of and for all the messuages or tenements and premises expressed to be thereby demised; *And* that all the covenants therein contained on the lessee's part have been duly observed and performed up to the day of the date of these presents; *And further*, that until payment of the said sum of £—— and the interest thereon, or, which shall first happen, until the said messuages or tenements and premises hereby assured shall be sold under the trusts hereinbefore declared, he the said [*mortgagor*], his executors or administrators, will well and truly pay the rent and perform the covenants on the lessee's part reserved and contained in the same indenture of lease; *And further*, that the said [*mortgagor*] is now lawfully possessed of the messuage or tenement and premises by the same indenture of lease demised, or therein expressed so to be, for all the residue of the said term of —— years thereby expressed to be granted therein, subject to the rent and covenants on the lessee's part in the same indenture reserved and contained; *And that* all and singular the same messuages or tenements and premises are so held by the said [*mortgagor*] free and clear of and from all mortgages, annuities, judgments, executions, liens, charges, and incumbrances whatsoever, (except as appears by these presents);

Limitation of amount of principal monies.

Covenants by mortgagor,

That original demise is valid;

That covenants therein have been performed;

To pay and perform future rents and covenants until sale;

That mortgagor is possessed of premises for the residue of term,

free from incumbrances, except as appears by these presents.

(*c*) *Vide* an observation, *ante*, p. 262.

UNDER-LEASE WITH TRUST FOR SALE.

And further, that the said [*mortgagor*], his executors and administrators, and every other person having or rightfully claiming, or who shall or may have or rightfully claim any estate, right, title, charge, trust, or interest, of, in, to, out of, or upon the said messuages or tenements and premises hereby assured, or intended so to be, or any of them, (except the respective persons claiming in respect of the several estates or interests hereinbefore excepted, but, nevertheless, in respect of only the same several estates or interests), shall and will at any time or times hereafter, upon every reasonable request made by the said [*mortgagee*], his executors, administrators, or assigns, or left by him or them with the tenants or occupiers of the same premises or any of them, but at the costs of the said [*mortgagor*], his executors or administrators, until the premises to which this covenant relates shall have been sold and assigned under the trusts hereinbefore contained, and, after such sale and assignment, then at the costs of the purchaser or purchasers thereof, his, her, or their executors, administrators, or assigns, make, do, and execute, and cause to be made, done, and executed, all such lawful and reasonable acts, deeds, and things, devices and assurances in the law whatsoever, for the more effectually assuring the said messuages or tenements and premises demised by the hereinbefore recited indenture of lease for all the residue of the said term of —— years, hereby granted according to the true intent and meaning of these presents; and also shall and will, at the like costs and charges, *if thereunto requested by the said* [*mortgagee*], *his executors, administrators, or assigns, by writing under his or their hand or hands, but not otherwise* (*d*), make, do, and execute, or cause to be made, done, and executed, all such assurances as aforesaid, for effectually vesting the said messuages or tenements and premises hereby assured, or intended so to be, in the said [*mortgagee*], his executors, administrators, or assigns, for all the residue of the said term of —— years granted by the said hereinbefore recited indenture of lease, not included in this demise, subject to such rent thereby re-

For further assurance.

To assign the residue of the term if required.

(*d*) These words are introduced to prevent the possibility of its being alleged to be compulsory on the covenantee to take an assignment. *Vide ante*, p. 321.

UNDER-LEASE WITH TRUST FOR SALE.

served as shall thenceforth accrue, and to the observance thenceforth of the covenants on the lessee's part therein contained, but upon and for such trusts, intents, and purposes, and with and subject to such powers and provisoes as are hereinbefore expressed, declared, and contained, of and concerning the same messuages or tenements and premises, as by the said [*mortgagee*], his executors, administrators, or assigns, or his or their counsel in the law, shall be lawfully and reasonably devised or advised and required;

Covenant by mortgagor to insure.

And moreover, that until the monies hereby intended to be secured shall be fully paid and satisfied, or, which shall first happen, until the said messuages or tenements and premises hereby assured shall be sold under the trusts aforesaid, it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, to insure and keep insured, in his or their own name or names, or otherwise, the same messuages or tenements and premises in or with any public office or company in the city of London or county of Middlesex for insurance against damage by fire, for any sum or sums of money not exceeding in the whole the sum of £——; and that he the said [*mortgagor*], his heirs, executors, or administrators, shall and will from time to time on demand pay or cause to be paid unto the said [*mortgagee*], his executors, administrators, or assigns, all such premiums, duty, and expenses, as he or they shall or may pay or expend in or about making or keeping on foot any such insurance or insurances, with interest thereon, at the rate of five *per cent. per annum: And it is hereby declared*, that all monies to be received by the said [*mortgagee*], his executors, administrators, or assigns, by virtue of any such insurance or insurances, shall (after payment thereout of the expenses of and incident to the recovery of the same,) be applied in the same manner as hereinbefore directed concerning the monies to arise from the sale or sales of the said messuages or tenements and premises expressed to be hereby assured. And the said [*mortgagee*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*mortgagor*], his heirs, executors, and administrators, that the said principal sum of £——, lent and advanced to him on the security of the said hereinbefore recited bond, shall remain on the security of the said bond and of these presents for the

Declaration of trust of insurance monies.

Covenant by mortgagee not to call in principal money;

UNDER-LEASE WITH TRUST FOR SALE.

term of seven years from the date hereof (*e*) except in the events hereinafter mentioned; and that he the said [*mortgagee*], his executors, administrators, or assigns, will not proceed to a sale of the said messuages or tenements and premises hereby assured or intended so to be, or any part thereof, or institute any proceedings at law or in equity by virtue of the said bond or of these presents, until the expiration of the said term of seven years, or until one calendar month after default shall be made during the said period of seven years in the payment of the interest of the said principal sum of £——, or any part thereof, on any or either of the half-yearly days of payment of interest mentioned in the said bond, or until the said [*mortgagor*], his executors or administrators, shall fail to pay the rent and perform the covenants reserved and contained by and in the said hereinbefore recited indenture of lease, and on the lessee's part to be paid and performed, after seven days' notice in writing shall have been given by the said [*mortgagee*], his executors, administrators, or assigns, to the said [*mortgagor*], his executors or administrators, or left for him or them at or upon the said mortgaged premises, calling upon him or them to pay the said rent or perform the said covenants; and if the said [*mortgagee*], his executors, administrators, or assigns, should commence any action at law against the said [*mortgagor*], his heirs, executors, or administrators, on the said recited bond, except at the time and in the events mentioned in this present covenant, then and in every such case these presents and the said covenant herein contained shall or may be pleaded or shewn in bar to such action (*f*); but nothing in this covenant contained shall extend to affect any purchaser or purchasers of the said premises, or any part thereof (*g*), either having

Nor institute any proceedings on bond or mortgage for a definite period.

(*e*) The incongruity suggested as belonging to clauses of this nature, *ante*, p. 239, does not apply where the agreement not to sue is subsequent to, and not contemporaneous with, the instrument fixing the earlier time of payment. See, as to the effect of these clauses in general, *Stanhope* v. *Manners*, 2 Ed. 197.

(*f*) As to this, *vide ante*, p. 200.

(*g*) Add, if so intended—

"and it is hereby declared and agreed, that the said Agreement by

UNDER-LEASE WITH TRUST FOR SALE.

or not having such notice as hereinbefore mentioned. And lastly, *it is hereby declared and agreed*, that neither the demise hereinbefore contained, nor any covenant entered into by the said [*mortgagor*] in and by these presents, shall extend or be construed to extend, to amount to a warranty by the said [*mortgagor*], his heirs, executors, or assigns, of the enjoyment of the messuages or tenements and premises hereby demised, free from and against the payment of the rent and the performance of the lessee's covenants reserved and contained by and in the said hereinbefore recited indenture of lease, after the same premises shall have been sold and assigned by the said [*mortgagee*], his executors, administrators, or assigns, under the trusts hereinbefore contained, any rule of law to the contrary notwithstanding(*h*). In witness, &c.

Clause negativing implied warranty as to purchasers.

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mortgagor not to pay mortgage money for a given period.

[*mortgagor*], his executors or administrators, shall not nor will pay or tender the said principal sum of £——, nor institute any suit or proceedings in equity for the redemption of the said premises hereby assured or intended so to be, until the expiration of the said period of seven years from the date hereof, or without giving to the said [*mortgagee*], his executors, administrators, or assigns, twelve calendar months' notice of his or their intention so to do, or leaving the same at his or their last or usual place of residence in England."

Suggestion as to under-leases with power of sale.

(*h*) Although it is probable that the express covenant to pay the rent, &c. until the sale, would be held to restrict the lessor's implied warranty on the words of demise, (on the principle adverted to, *ante*, Vol. 4, p. 371), yet it seems to be desirable expressly to negative this liability. When a person, having an under-lease with trusts for sale, exercises his power, he should, if possible, induce the mortgagor to concur in the sale, not for the purpose of giving it validity, (for that is beyond all doubt), but merely, by granting his nominal reversion, to make the purchaser assignee of the whole term, to avoid the technical incongruities attending the sale of an under-lease in such cases. The mortgagor, if well advised, would readily accede to this requisition, as it is better for him that the purchaser should take an assignment, and thereby subject himself to the rents and covenants. In one instance, in order to avoid the difficulty here suggested, the mortgagor nominated a third person as his attorney to execute an assignment of the reversion in the event of sale. Such an authority, of course, would be subject to revocation by the death or act of the mortgagor.

COVENANT *to surrender* COPYHOLD *of* INHERITANCE *by* WAY *of* MORTGAGE (*a*). (VARIATION *where there is a* PRIOR MORTGAGE).

COVENANT TO SURRENDER COPYHOLDS BY WAY OF MORTGAGE.

THIS INDENTURE, made &c., BETWEEN [*mortgagor*], of &c., of the one part; and [*mortgagee*], of &c., Parties.

(*a*) In mortgaging copyholds, it is necessary that there should be a deed, in addition to the surrender, for the purpose of making the mortgagor covenant for the title and the payment of the money, as the surrender contains no covenants. This deed may be either precedent to, contemporaneous with, or subsequent to the surrender. The precedent *supra* in the text, exemplifies the first, and the following precedent the second of these modes. But even where the deed is in the form of a covenant to surrender, it is frequently executed simultaneously with the surrender. The surrender is made either at the next general Court, or at a special Court, or (which is more common) out of Court, to the steward or his deputy. The mortgagee should not pay his money until both the deed and surrender are completed. The completion of the surrender is of course increasingly important, where its operation is required to bar the interests of persons who would not be bound by the covenant, (as where an entail is to be barred, or the concurrence of a *feme covert* is requisite, &c.) and even in other cases, a mortgagee cannot be advised to rely merely upon a covenant to surrender, which confers an equitable title only, liable therefore to be postponed to a future purchaser or mortgagee, acquiring the legal estate without notice. See *Oxwick* v. *Plumer*, 5 Bac. Ab. Gwill. ed. 43. Where the mortgagor has an equitable interest only, the legal title being in a former mortgagee, or in any other person, the objection to a covenant merely does not apply, as such a covenant binds all the interest the mortgagor has. As to mortgages of copyholds.

It may be observed, that a copyhold of inheritance, where the fines are small and certain, and the custom imposes no burthensome obligations on the tenants, is scarcely less eligible as a security to a mortgagee than a freehold. Indeed it possesses an advantage over the latter, in being exempt from judgments and crown debts, which, considering the difficulty that is sometimes experienced in ascertaining the existence of these incumbrances, is more important to a mortgagee than the inconveniences attending the tenure, such as the necessity of obtaining a licence to cut timber, to demise, &c.

COVENANT TO SURRENDER COPYHOLDS BY WAY OF MORTGAGE.

of the other part: WHEREAS the said [*mortgagor*] is seised of or well entitled unto the fee-simple, according to the custom of the manor of ——, of and in the messuages or tenements, lands and hereditaments hereinafter described, and covenanted to be surrendered (*b*): AND WHEREAS the said [*mortgagor*], having occasion for the sum of [*mortgage money*], hath applied to and requested the said [*mortgagee*] to advance and lend him the same, which the said [*mortgagee*] hath agreed to do, upon having the repayment thereof with interest secured by a mortgage of the said copyhold hereditaments, in manner hereinafter mentioned. NOW THIS INDENTURE WITNESSETH, that, for and in consideration of [*mortgage money*] of lawful money of Great Britain and Ireland, paid by the said [*mortgagee*] to the said [*mortgagor*] at or before the execution of these presents, the receipt whereof the said [*mortgagor*] doth hereby acknowledge, and of and from the same and every part thereof doth acquit, release, and for ever discharge the said [*mortgagee*], his heirs, executors, administrators, and assigns, the said [*mortgagor*], for himself, his heirs, executors and administrators, doth hereby covenant and agree with the said [*mortgagee*], his heirs and assigns: That the said [*mortgagor*], or his heirs, shall and will, at the costs and charges in all things of the said [*mortgagor*], his heirs, executors, or administrators, at the next court baron to be holden for the said manor of ——, or out of court, as soon as conveniently may be, either in person or by attorney, well and effectually surrender into the hands of the lord or lords, lady or ladies of the said manor, according to the custom of the manor, ALL THAT (*describe par-*

Recital that mortgagor is seised in fee according to the custom of the manor.

Recital of agreement to lend the money.

Testatum.

Mortgagor covenants to surrender to the mortgagee in fee.

(*b*) If there is a prior mortgage, add—

Variation, where there is a prior mortgage.

"Subject to a certain conditional surrender made on or about the —— day of ——, whereby the said hereditaments were surrendered and assured by the said [*mortgagor*], To the use of [*former mortgagee*], of &c., his heirs and assigns, for securing to him the said [*former mortgagee*], his executors, administrators, or assigns, the sum of £——, and interest."

cels); Together with all and singular outhouses, edifices, buildings, ways, waters, water-courses, trees, woods, underwoods, hedges, ditches, fences, profits, privileges, easements, advantages, rights, members, and appurtenances whatsoever, to the said several hereditaments and premises, or any part or parts thereof, belonging or appertaining, or now or at any time or times heretofore usually held, occupied, or enjoyed therewith; *And also* all the estate, right, title, or interest at law or in equity of the said [*mortgagor*], in or to, or out of, the said hereditaments: To THE USE of the said [*mortgagee*], his heirs and assigns for ever, *To the intent* that the said [*mortgagee*], his heirs or assigns, may be admitted tenant or tenants of the said copyhold premises, *To hold* the same at the will of the lord, according to the custom of the said manor, and by and at the rents, suits, and services therefore due and of right accustomed; subject nevertheless to the proviso for redemption hereinafter contained. AND the said [*mortgagor*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*mortgagee*], his heirs or assigns, that until such surrender as aforesaid shall be made by the said [*mortgagor*], and the said [*mortgagee*], or his heirs, shall be admitted tenant or tenants of the said premises, he the said [*mortgagor*], or his heirs, shall and will stand and be seised of and interested in the said copyhold premises, upon trust for the said [*mortgagee*], his heirs or assigns, but subject nevertheless to the proviso for redemption hereinafter contained: PROVIDED ALWAYS, and it is hereby declared and agreed by and between the said parties to these presents, that, if the said [*mortgagor*], his heirs, executors, or administrators, or any of them, shall and do well and truly pay or cause to be paid unto the said [*mortgagee*], his executors, administrators, or assigns, at or in the common dining-hall of Lincoln's Inn, in the county of Middlesex, the full sum of £—— of lawful money of Great Britain and Ireland, with interest for the same after the rate of five pounds for every one hundred pounds by the year, in manner following, that is to say, the sum of [*half year's interest*] being half a year's interest for the said sum of £——, after

COVENANT TO SURRENDER COPYHOLDS BY WAY OF MORTGAGE.

COVENANT TO SURRENDER COPYHOLDS BY WAY OF MORTGAGE.

the rate aforesaid, upon the —— day of —— next ensuing the date of these presents, and the further sum of £——, being the said principal sum of £——, and another half year's interest thereon, after the rate aforesaid, upon the —— day of —— then next following, and which will be in the year of our Lord —— (*c*), without any deduction or abatement whatsoever, then these presents, and the surrender to be made of the said copyhold hereditaments and premises as aforesaid, shall determine and be absolutely void, to all intents and purposes whatsoever: AND, for the consideration aforesaid, he the said [*mortgagor*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*mortgagee*], his executors, administrators, and assigns, that he the said [*mortgagor*], his heirs, executors, or administrators, shall and will well and truly pay, or cause to be paid, unto the said [*mortgagee*], his executors, ad-

Covenants to pay the principal and interest.

(*c*) Some persons add—

Variation where proviso for redemption extends to the payment of fines.

"And if the said [*mortgagor*], his heirs, executors, or administrators, do and shall further well and truly pay, or cause to be paid unto the said [*mortgagee*], his heirs, executors, administrators, or assigns, on demand, all rents, fines, and other outgoings and expenses (if any) which he the said [*mortgagee*], his heirs, executors, administrators, or assigns, may have paid or incurred in respect of the said copyhold hereditaments and premises hereby covenanted to be surrendered, or any part thereof, (not exceeding, with the said sum of [*mortgage money*], the principal sum of £——), with interest for the same, at the rate aforesaid, from the time or respective times of the expenditure thereof," &c.

But, even without a clause of this nature, a mortgagor would not be permitted by a Court of Equity to redeem, without reimbursing the mortgagee these sums with interest at 4 *per cent.* (the clause, it will be observed, gives interest at the rate of 5 *per cent.*) If, however, a surrender (and the principle of course applies to any other conveyance) were made upon condition to pay principal and interest on a given day, without any provision as to *fines*, &c. the mortgagee's estate at law would cease on tender of the principal and interest alone; and therefore the clause in question may, it is apprehended, be usefully inserted, with a view to such a case.

ministrators, or assigns, the said sum of £——, and interest, at the days and times, and in the manner, hereinbefore mentioned, and to be appointed for payment thereof, in the said surrender hereinbefore covenanted to be made as aforesaid, without making any deduction or abatement whatsoever out of the same or any part thereof, for or on account of taxes, or any other cause, matter, or thing whatsoever. *And* the said [*mortgagor*], for himself, his heirs, executors, and administrators, doth hereby further covenant and agree with the said [*mortgagee*], his heirs and assigns, in manner following, that is to say, that he the said [*mortgagor*] now is lawfully and rightfully seised of and in, or well entitled unto, the said copyhold hereditaments and premises hereinbefore covenanted to be surrendered, with their appurtenances, for an absolute and indefeasible estate of inheritance in fee-simple in possession, at the will of the lord, according to the custom of the said manor of ——; *And that* he the said [*mortgagor*] now hath in himself good right, and lawful and absolute authority, to surrender the said copyhold hereditaments and premises hereinbefore covenanted to be surrendered, or intended so to be, and every part and parcel of the same, with their appurtenances: *To the use* of the said [*mortgagee*], his heirs and assigns, at the will of the lord, according to the custom of the said manor, and according to the covenant hereinbefore contained; *And further*, that in case default shall be made in payment of the said sum of £——, and the interest thereof, or any part of the same respectively, at the several days or times hereinbefore appointed for the same, that it shall be lawful for the said [*mortgagee*], his heirs and assigns, immediately after such surrender to be made to the use of him, his heirs and assigns, as aforesaid, and he or they shall have been duly admitted thereon, at all times thereafter to enter into and upon, have, hold, and enjoy, all and singular the said copyhold hereditaments and premises hereinbefore covenanted to be surrendered, or intended so to be, and every part and parcel of the same, with their appurtenances, and to receive and take the rents, issues, and profits thereof, according to the true intent and meaning of these presents, without any let,

COVENANT TO SURRENDER COPYHOLDS BY WAY OF MORTGAGE.

Covenants by mortgagor;

that he has good right to convey.

For quiet enjoyment after surrender, admittance, and default.

COVENANT TO SURRENDER COPYHOLDS BY WAY OF MORTGAGE.

suit, trouble, eviction, or denial whatsoever, of, from, or by the said [*mortgagor*], his heirs or assigns, or any person or persons whomsoever (*d*); *And that* free and clear, and freely, clearly, and absolutely acquitted, exonerated, released, and discharged, or otherwise by him the said [*mortgagor*], his heirs, executors, or administrators, at his and their own costs and charges, in all things well and sufficiently protected and kept indemnified of, from, and against all former and other grants, mortgages, leases, surrenders, bargains, sales, jointures, free bench, uses, trusts, wills, entails, annuities, estates, titles, liens, charges and incumbrances whatsoever (*e*), except the rents and services henceforth to become due and to be paid, done, and performed in respect of the same premises, according to the custom of the said manor of ——; *And moreover*, that he the said [*mortgagor*], his heirs and assigns, and every other person whosoever, lawfully claiming or to claim any estate, right, title, trust, or interest, at law or in equity, of, in, to, or out of, the said copyhold hereditaments and premises hereinbefore covenanted to be surrendered, or intended so to be, or any part or parcel thereof (other than and except the person or persons whose estate or interest, or several estates or interests, is or are hereinbefore excepted, in respect of the same estate or interest, or several estates and interests), shall and will at all times hereafter on every reasonable request of the said [*mortgagee*], his heirs or assigns, but at the sole costs and charges of the said [*mortgagor*], his executors, administrators, or assigns, make, do, and execute all such further and other lawful and reasonable acts, deeds, surrenders, conveyances, and assurances in the law whatsoever, for more effectually and absolutely surrendering and assuring the said copyhold

Free from incumbrances.

Further assurance.

Variation, where there is a prior security.

(*d*) " other than and except the person or persons whose estate or interest, or several estates or interests, is or are hereinafter excepted, for or in respect of the same estate or interest, or several estates or interests;"

(*e*) " other than and except the said surrender, by way of mortgage, made to the said [*former mortgagee*] as aforesaid, and the principal money and interest thereby secured, and also"

COVENANT TO SURRENDER COPYHOLDS BY WAY OF MORTGAGE.

hereditaments and premises hereinbefore covenanted to be surrendered, or any part or parcel of the same, with their appurtenances, *To the use* of the said [*mortgagee*], his heirs or assigns, at the will of the lord, according to the custom of the said manor, and the true intent and meaning of these presents, as by the said [*mortgagee*], his heirs or assigns, or his or their counsel in the law, shall be reasonably advised or devised and required. *(Add covenants to insure, if so intended, and declaration that the mortgagor shall enjoy until default).* IN WITNESS, &c.

CONDITIONAL SURRENDER *out of Court of a* COPYHOLD *of* INHERITANCE.

CONDITIONAL SURRENDER OF COPYHOLDS OF INHERITANCE.

Manor of ——, *in the County of* ——. } BE IT REMEMBERED, that on the —— day of &c., [*mortgagor*] &c. (*y*), one of the customary tenants of the said manor, came before [*steward*], gentleman, steward of the said manor (*a*), and in consideration of the sum of £—— to the said [*mortgagor*] (*y*) in hand then paid by [*mortgagee*], of &c., (*b*) (*z*) did out of court surrender into the hands of

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(*y*) If the wife joins in the surrender, add—
" and [*wife*] his wife, customary tenants, &c."

(*a*) *Or* " before [*deputy steward*], of &c., deputy steward of [*chief steward*], of &c., chief steward of the said manor."

(*b*) If the mortgage is to secure an existing debt, say—
" in consideration of the sum of £——, due and owing from the said [*mortgagor*] to the said [*mortgagee*],"

(*z*) " and the said wife being first examined by the said [*steward*] *, separately and apart from her said husband, and freely consenting thereto,"

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* *Or* " deputy steward,"

CONDITIONAL SURRENDER OF COPYHOLDS OF INHERITANCE.

the lord of the said manor by the hands and acceptance of the said steward (*c*) by the rod, according to the custom of the said manor: ALL &c. *(describe the lands)* with the appurtenances; And the reversion and reversions, remainder and remainders, rents, issues, and profits thereof; *And all* the estate, right, title, interest, use, trust, benefit, property, claim, and demand whatsoever of the said [*mortgagor*] (*y*), in, to, or out of the same premises and every part thereof, *To the use* of the said [*mortgagee*], his heirs and assigns for ever, by copy of court roll, at the will of the lord, according to the custom of the said manor, at the rents and services therefore due and of right accustomed, subject nevertheless to and upon this express condition, that, if the said [*mortgagor*] (*y*), his heirs, executors, or administrators, do and shall well and truly pay or cause to be paid unto the said [*mortgagee*], his executors, administrators, or assigns, the sum of £——, of lawful money of Great Britain and Ireland, on the —— day of —— next, together with interest for the same after the rate of 5*l. per centum per annum*, computed from the day of the date of this surrender, clear of all taxes and other deductions whatsoever, then this surrender is to be void and of no effect, otherwise it is to remain in full force and virtue (*d*).

(*c*) *Or* "deputy steward."

(*y*) "and [*wife*] his wife, or either of them, their or either of their heirs," &c.

As to admission, &c. of mortgagees of copyholds.

(*d*) It is not often that mortgagees are admitted under conditional surrenders of copyholds; and where the mortgage is paid off, an acknowledgment of satisfaction is entered on the Court Rolls. If the mortgagee has been admitted, there must be a resurrender to and admission of the mortgagor at the expense of the latter. The mortgagee of a copyhold, after forfeiture, may foreclose without having been admitted. *Sutton* v. *Stone*, 2 Atk. 101. Much of the doctrine in regard to securities of copyholds, which would have properly found a place here, has been anticipated by Mr. Bythewood in a preceding note. (*Vide ante*, Vol. 1, p. 563.)

It should be observed, that, instead of a deed of covenants to accompany a conditional surrender, the mortgagor sometimes gives a bond con-

ditioned for the payment of the money, quiet enjoyment, &c. The following is a short form of such a bond:—

BOND ACCOMPANYING CONDITIONAL SURRENDER OF COPYHOLDS.

KNOW ALL MEN, &c., *ut ante*, Vol. 3, p. 179.

WHEREAS the above-bounden [*mortgagor*], being a copyhold tenant of the manor of ——, in the county of ——, in respect of the piece or parcel of land and hereditaments hereinafter mentioned, has this day, in consideration of the sum of £——, of lawful money of Great Britain and Ireland, to him then paid by the above-named [*mortgagee*], surrendered into the hands of the lord *(or* lady, *as the case may be)* of the said manor, by the acceptance of [*steward*], of &c., the steward of the said manor, *All that* piece or parcel of land called ——, situate, lying, and being in the said parish of —— in the county of ——, and now in the occupation of ——; *To the use* of the said [*mortgagee*], his heirs and assigns, for ever, at the will of the lord, according to the custom of the said manor, at and under the rents, fines, and services therefore due and of right accustomed; subject nevertheless to a proviso or condition for the redemption of the said copyhold premises, and the avoidance of the said surrender, if the said [*mortgagor*], his heirs, executors, or administrators, should faithfully pay or cause to be paid unto the said [*mortgagee*], his executors, administrators, and assigns, the sum of £—— and interest thereon after the rate of 5*l.* for every 100*l.* by the year, on the —— day of —— now next ensuing, and also all heriots, fees for admittance, and other fines, fees, and customary dues and payments whatsoever, (not exceeding in the whole, together with the said principal sum of £—— hereinbefore mentioned, the sum of £——(*e*),) which the said [*mortgagee*], his heirs or assigns, shall or may pay or become liable to pay in respect of the said copyhold premises, or any part thereof, at the time of his admission thereto, or previously or subsequently to such admission, with interest on the sum and sums of money so paid at the rate aforesaid, without making any deduction out of the

Recital of surrender.

(*e*) As to this, *vide ante*, p. 262.

BOND ACCOMPANYING CONDITIONAL SURRENDER OF COPYHOLDS.

said several payments on any account whatsoever. Now THE CONDITION *of the above-written bond or obligation is such*, that if the said [*mortgagor*], his heirs, executors, or administrators, do and shall pay or cause to be paid unto the said [*mortgagee*], his executors, administrators, or assigns, the said principal sum of £—— and interest, and all sums of money for heriots, fees for admittance, fines, and other fines and fees and customary dues and payments whatsover, (not exceeding in the whole the said sum of £——), which he the said [*mortgagee*], his executors, administrators, or assigns, shall pay or become liable to pay in respect of the said copyhold premises, at the time of his admission thereto, or previously or subsequently to such admission, with interest for the same after the rate aforesaid, according to the true intent and meaning of the proviso or agreement for redemption of the said premises contained in the said surrender: *And also*, if he the said [*mortgagor*] was, at the time of making the said surrender, lawfully and rightfully seised to him and his heirs of the said copyhold premises, to his and their own use, for an absolute estate of inheritance therein, by copy of court roll, at the will of the lord, according to the custom of the said manor; *And also*, if he then had good right, full power, and lawful and absolute authority to surrender the same to the use of the said [*mortgagee*], his heirs and assigns, in manner and form, and according to the tenor and effect of the said surrender; *And that* free and clear from all estates, liens, charges and incumbrances whatsoever, (save and except the rents, duties, suits, and services for the said copyhold premises due and of right accustomed, according to the custom of the said manor); *And moreover*, if he the said [*mortgagor*] and his heirs, and all persons claiming or to claim any estate, charge, or interest in or to the said copyhold premises, (except the person or persons whose estate or interest, or respective estates or interests is or are hereinbefore excepted), do and shall, at the request of the said [*mortgagee*], his executors, administrators, and assigns, but at the costs and charges of the said [*mortgagor*], his executors, administrators, or assigns, make, do, and execute, or cause to be made, done, and executed, all such further and other surrenders and assurances for the more

Condition,

if mortgagor should pay mortgage money, fines, &c.

and if he were lawfully seised,

and had right to convey,

free from incumbrances;

and executed further assurances;

effectually conveying and assuring the said copyhold premises, with the appurtenances, to the use of the said [*mortgagee*], his heirs and assigns, according to the true intent and meaning of the said recited surrender, as he the said [*mortgagee*], his heirs, executors, administrators, or assigns, or his or their counsel in the law shall reasonably advise and require; Then the above-written bond or obligation to be void, or else to be and remain in full force and virtue.

BOND ACCOMPANYING CONDITIONAL SURRENDER OF COPYHOLDS.

Bond to be void.

Signed, sealed, and delivered in the presence of ——.

DEED *accompanying a* CONDITIONAL SURRENDER *of* COPYHOLDS, *whereby the Mortgagor* COVENANTS *for Payment of the* PRINCIPAL *and* INTEREST, *and declares* TRUSTS *for* SALE *in default of Payment* (*a*). *Also Covenants for* TITLE. (VARIATION *where Mortgage is made to a* SOLICITOR *as a* SECURITY *for* COSTS).

COPYHOLDS IN TRUST FOR SALE. SECURITY TO A SOLICITOR FOR COSTS.

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, BETWEEN [*mortgagor*], of &c., of the one part; and [*mortgagee*], of &c., of the other part. [WHEREAS the said [*mortgagee*] has this day (*b*) lent and advanced unto the said [*mortgagor*] the sum of £—— at interest, as he doth hereby acknowledge. AND WHEREAS, for securing the repayment thereof, the said [*mortgagor*] hath

Parties.

Recital of money advanced.

Surrender.

(*a*) Perhaps it is more correct to introduce the trusts for sale into the surrender, as otherwise the surrender describes part only of the transaction; but the present is the more usual course, the parties being in general anxious not unnecessarily to increase the length of the surrender, in order to save expense.

As to inserting trusts for sale in a surrender.

(*b*) If the surrender be antecedent to the present deed, it may of course be recited as such; but it is more common to recite them as contemporaneous.

COPYHOLDS IN TRUST FOR SALE. SECURITY TO A SOLICITOR.

also this day surrendered (*c*)] into the hands of the lord of the manor of —— in the county of ——, by the acceptance of [*steward*], steward of the said manor, according to the custom thereof; All that *(describe parcels) To the use* of the said [*mortgagee*], his heirs and assigns, for ever, to be holden at the will of the lord, and according to the custom of the said manor, at and under the rents and services therefore due and of right accustomed, *Subject nevertheless* to a proviso or condition for redemption of the said premises, and avoidance of the said surrender, on payment by the said [*mortgagor*], his heirs, executors, or administrators, unto the said [*mortgagee*], his executors, administrators, or assigns, of the said sum of £——, of lawful mo-

To the use of mortgagee in fee.

Proviso for redemption.

(*c*) Where the security is to an attorney for costs, introduce the following recital instead of that within brackets.

Variation where mortgage is to a solicitor for costs.

"WHEREAS the said [*mortgagee*] has for some time past acted as the attorney, solicitor, and agent of the said [*mortgagor*], in prosecuting and defending various actions at law and suits in equity, and in preparing conveyances and assurances, and otherwise in the management and conduct of the business and affairs of the said [*mortgagor*]: AND WHEREAS there is now due and owing from the said [*mortgagor*] to the said [*mortgagee*], for the costs and charges incurred in the business transacted for him as aforesaid, and for disbursements made in the course of such business, the sum of £——, as appears by several bills of costs duly made out and delivered by the said [*mortgagee*] to the said [*mortgagor*], in the month of —— last, which the said [*mortgagor*] does hereby acknowledge: AND WHEREAS the said [*mortgagor*] has carefully perused and examined the several items contained in the said bills of costs, and is perfectly satisfied therewith; but being unable at present to pay the amount of the said bills, he has requested the said [*mortgagee*] to accept a security on the copyhold hereditaments of the said [*mortgagor*] hereinafter mentioned, for the payment of the said sum of £—— with interest, to which request and proposal the said [*mortgagee*] has assented and agreed; AND WHEREAS, in pursuance of the said agreement, the said [*mortgagor*] hath this day surrendered," &c. *ut supra*.

ney of Great Britain and Ireland, on the —— day of ——, which will be in the year ——, with interest for the same in the meantime at the rate of 5*l.*, of lawful money aforesaid, for every 100*l.* by the year, by equal quarterly payments, on the —— day of ——, the —— day of ——, the —— day of ——, and the —— day of ——, yearly and every year, the first of the said quarterly payments to be made on the —— day of —— next: And also on payment by the said [*mortgagor*], his heirs, executors, or administrators, of all rents, taxes, rates, assessments, and charges, in respect of the said premises, which may have been paid or incurred by the said [*mortgagee*], his executors, administrators, and assigns, as hereinafter mentioned, and interest thereon at the rate aforesaid. AND WHEREAS, upon the treaty (*d*) for the said loan, it was

MORTGAGE IN TRUST FOR SALE. SECURITY TO A SOLICITOR.

Principal money payable at a future day, interest in the meantime quarterly.

Agreement for present security.

(*d*) If the security is to an attorney, *ut supra*, say—

"upon the treaty hereinbefore recited between the said [*mortgagor*] and [*mortgagee*], it was agreed by and between them, that, for the more effectually securing the payment of the said sum of £——, due and owing to the said [*mortgagee*] as aforesaid, and interest thereon, the said [*mortgagor*] should enter," &c.

An attorney cannot take a mortgage from his client to secure future costs.

Lord *Eldon* has lately decided, that an attorney cannot take a mortgage from his client to secure future costs. Thus, in *Jones* v. *Tripp*, Jac. 322, where, by indenture dated 31 October, 1817, C., a defendant, mortgaged certain estates to the defendant B., his solicitor; the plaintiff A. was a prior mortgagee upon the same estates for 600*l.*, and was also a creditor of C. for a further sum, to recover which he had brought an action in Easter Term, 1817, and obtained judgment against him for 2586*l.*: A. now prayed a foreclosure, and that the deed of October, 1817, might be delivered up, being executed fraudulently for the purpose of defeating his security, and that his judgment debt might be tacked to the mortgage. The consideration for the mortgage of October, 1817, was a sum of 70*l.* stated to be due to B. for business done by him as the attorney of C., and it was made to secure that sum, and *also the costs of such actions and suits as B. might afterwards defend or prosecute for C.*, and all sums that he might pay on his account, not exceeding in the whole the sum of 1000*l.* B. stated the debt now due to him to be more than 1000*l.* He was apprised of A.'s judgment, having been attorney in the action. Sir *J. Leach*, V. C., had directed an issue to try whether the indenture of October, 1817, was fraudulently executed as against A.; and a verdict having been found in the affirmative, B.

COPYHOODS IN TRUST FOR SALE. SECURITY TO A SOLICITOR.

agreed that, for the more effectually securing the payment of the said principal sum and interest, the said

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moved for a new trial. The motion was refused by the Vice Chancellor, and was now renewed before the Lord Chancellor; his Lordship stopped the motion, by saying, that it was a case in which an issue ought not to have been directed. *The Court would not permit any attorney to take from his client a mortgage for costs to be incurred;* the inducement for C. to execute the deed, was, that B. should proceed in his business for him; "such a security" said his Lordship, "cannot be allowed; the deed on the face of it is not supportable; so clearly so, that I cannot permit it to be argued, and I should be shaking the jurisdiction of the Court, if I allowed a trial on such a subject; it would be to leave to a jury to decide a point of law that is well settled. If any distinction can be made as to the 70*l.* due at the date of the deed, that would only be a reason for a re-hearing; and whether the Court will allow the deed to stand as a security for that sum, considering its other contents, is a point I will not decide, because it can be no ground for granting a new trial." The same point was decided by the Court of Exchequer in the case of *Pitcher* v. *Rigby*, 9 Price, 79; and though in a subsequent case, *Williams* v. *Piggott*, Jac. 602, Sir *T. Plumer*, M. R., seems to have felt some hesitation in applying the doctrine, yet, upon the cause coming on for further directions before his Honor's successor, Lord *Gifford*, his Lordship, on the authority of the case in the Exchequer, refused to decree an account of costs subsequent to the mortgage deed. These decisions were somewhat a surprise upon the profession; for it had been considered, that, as the charges made by a solicitor, though secured by a mortgage, are open to taxation, *Walmsley* v. *Booth*, 2 Atk. 29; *Newman* v. *Payne*, 4 B. C. C. 350; *Morgan* v. *Lewes*, 4 Dow, 29, no greater mischief could arise from a security made to cover future costs, than in any other case where it extends to a future fluctuating debt.

But a mortgage to secure costs actually incurred is valid.

It is clear, however, that an attorney may take a security for costs then actually incurred, and the mortgage will be good to this extent, though professing to embrace future costs. Thus, in *Williams* v. *Piggott*, Jac. 598, where by indenture dated the 18th of February, 1819, reciting that the defendant had employed the plaintiffs as her attorneys in the defence of certain actions and indictments, and other business, and a considerable sum was due from her to them, and the management thereof would be attended with future expense, and that they had applied to her to give them some security for such past and future expenses, if the same should not exceed 500*l.*, the defendant assigned, and covenanted to surrender, a copyhold estate to one of the plaintiffs, with a proviso for redemption in case of her paying on the 18th of February, 1820, all such sums as should be due from her to the plaintiffs for the said business, not exceeding 500*l.* The plaintiffs filed a bill praying an account of the costs due to them, and pray-

[*mortgagor*] should enter into the covenants and declarations hereinafter contained. NOW, THEREFORE,

COPYHOLDS IN TRUST FOR SALE. SECURITY TO A SOLICITOR.

Testatum.

ing that the defendant might pay the amount, or the mortgage might be foreclosed. The defendant, in her answer, complained that the plaintiffs had mismanaged her business, and declined to continue to act for her while some of the matters were pending. Sir *T. Plumer*, M. R., was of opinion, that the late case of *Jones* v. *Tripp* did not apply to a security for costs actually incurred; and that, as there was in this case no allegation of fraud or unfair dealing, and no objection but that which arose from the relation of attorney and client, his Honor referred it to the Master to tax the bills for the costs due at the date of the mortgage.

General doctrine as to transactions between attorney and client.

But though a security for monies actually due cannot be impeached on the mere ground of the relation of attorney and client, yet the Courts watch all such transactions with jealousy. In *Walmsley* v. *Booth*, 2 Atk. 25, Lord *Hardwicke* relieved against a bond given by a person to his attorney, conditioned to bequeath him a legacy of 1000*l.* in consequence of services rendered to the obligor in the course of some prosecutions against him, pending which, and while under the influence of much distress, the bond was given. See also *Newman* v. *Payne*, 4 B. C. C. 350, where Lord *Thurlow* set aside a bond for 1000*l.* given by a person to his attorney, and certain mortgage securities, for specific sums stated to be due for costs, and directed the Master to take an account, and the attorney to re-convey upon payment of what was due. (See also cases referred to, *ante*, p. 338).

Of course, an attorney may receive a mortgage from his client for sums advanced, or to be advanced, and such a mortgage will be good to this extent, though it include future costs; *Pitcher* v. *Rigby*, 9 Price, 79; but he should always be prepared (and indeed the observation applies, to a certain extent, to all mortgagees) with indubitable evidence that the monies were actually advanced. Where there have been previous accounts between the parties, the Court have in some instances gone into those accounts, though settled several years since, and the vouchers delivered up, refusing to admit the statement in the securities themselves as evidence of the existence of the debts; but, where the vouchers have been parted with, the Courts will receive secondary evidence. *Morgan* v. *Lewes*, 4 Dow, 29.

The disability of solicitors to take a security for future costs, should be viewed in connection with their title to a lien on deeds and papers in their hands, for in both cases the rules adopted by the Court constitute part of, and flow from that system of control on the one hand, and privilege on the other, which is grounded on the peculiar relation in which solicitors stand, as the officers of the Court, and the persons through whom alone justice is administered to the public.

Extent of soli-

A solicitor's lien on deeds and papers is general, and is not confined to

COPYHOLDS IN TRUST FOR SALE. SECURITY TO A SOLICITOR.

THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and for the considerations

citor's lien on deeds, &c.

the particular business in the conduct of which they come into his hands; *Ex parte Nesbitt*, 2 Sch. & Lef. 279; *Hollis* v. *Claridge*, 4 Taunt. 807; *Stevenson* v. *Blakelock*, 1 Mau. & Selw. 535; unless they are deposited with a special agreement; *Ex parte Sterling*, 16 Ves. 258; or for a specific purpose; see 1 Turn. 92. But the lien does not, it seems, extend to an original will prepared by him, and which, therefore, he is not entitled to hold against the testator's representatives for monies due from such testator; *Georges* v. *Georges*, 18 Ves. 294; *Lord* v. *Wormleighton*, Jacob, 580; see also 1 Turn. 92; nor, of course, does it extend beyond the client's interest in the subject-matter to which the deeds relate; *Ex parte Nesbitt*, 2 Sch. & Lef. 279; nor to debts due to him in any other than his professional character, as for loans of money; see 2 Jac. & Walk. 218; or to documents deposited with him in any other character, as for instance in that of steward. *Champernown* v. *Scott*, 6 Madd. 93; *Balch* v. *Symes*, 1 Turn. 87.

Effect of taking security.

The taking security for costs does not necessarily destroy a solicitor's lien; *Stevenson* v. *Blakelock*, 1 Mau. & Selw. 535; but where a firm accepted bills *at three years' date*, for their bills of costs, Lord *Eldon* was of opinion, that the lien was impliedly abandoned, as it could not have been intended that the papers should be locked up from the client's use during so long a period. *Cowell* v. *Simpson*, 16 Ves. 275.

A solicitor has also a lien on a fund in Court, *Wilkins* v. *Carmichael*, Doug. 104, in regard to the particular suit at least; *Worrall* v. *Johnson*, 2 Jac. & Walk. 214; *Lann* v. *Church*, 4 Madd. 391; (but *quære* as to other matters, see 4 Madd. 391; 2 Jac. & Walk. 214); and on monies ordered to be paid to his client for costs; *Ex parte Bryant*, 2 Rose, 237; and also it seems on other sums passing through his hands, as the payment of an annuity. *Skinner* v. *Sweet*, 3 Madd. 244. But the rules in favour of solicitors' liens do not apply to certificated conveyancers, who cannot, therefore, retain papers intrusted to them in a particular matter, as a security for a general balance, *Hollis* v. *Claridge*, 4 Taunt. 807, though they are at liberty, in common with other persons, to detain any deeds or papers on account of any work or labour performed upon them; the distinction, in the words of the Chief Justice (*Gibbs*), being, "that, if the lease were delivered to the defendant, by a person having a right to dispose of it, that he might do any thing upon this particular deed, by the general law of the land he has a lien upon it, whether he were attorney or not; if it were another deed than that on which the operation is to be performed, it would be necessary for him to be an attorney, to have the benefit of the custom, and to enable him to retain other papers than those on which the work is to be done." See also *Chase* v. *Westmore*, 5 M. & S. 180.

COPYHOLDS IN TRUST FOR SALE. SECURITY TO A SOLICITOR.

hereinbefore expressed, the said [*mortgagor*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*mortgagee*], his executors, administrators, and assigns, in manner following, (that is to say), that he the said [*mortgagor*], his heirs, executors, or administrators, shall and will well and truly pay, or cause to be paid, unto the said [*mortgagee*], his executors, administrators, or assigns, the said sum of £—— of lawful money as aforesaid, on the —— day of —— which will be in the year of our Lord ——, with interest for the same in the meantime, after the rate of 5*l.* of like lawful money for every 100*l.* by the year, by equal quarterly payments, on the —— day of ——, the —— day of ——, the —— day of ——, and the —— day of ——, yearly and every year, the first of the said quarterly payments to be made on the —— day of ——; *And also*, shall and will in the meantime, and until full payment and satisfaction of the said principal sum and interest as aforesaid, well and truly pay, discharge, and satisfy all and all manner of annual and other rents, taxes, rates, and assessments whatsoever, which now are, or at any time hereafter shall be charged upon or payable in respect of the hereditaments hereinbefore mentioned to have been surrendered, or any of them, and whether such taxes, rates, and assessments shall be in the nature of

Covenant by mortgagor to pay principal and interest monies.

To pay taxes.

It is to be observed, that an attorney has no right to detain papers of an opposite party, on account of monies due from his own client, since the client himself had no right to detain them, and his (the solicitor's) right of detention can only be commensurate with that of the client, whose agent he is. *Hollis* v. *Claridge*, 4 Taunt. 807. (As to the right of a town agent to detain papers, see *Chapman* v. *Clarke*, cit. 2 Dick. 802; *Ward* v. *Hepple*, 15 Ves. 297; *Ex parte Steele*, 16 Ves. 164; *Bray* v. *Hine*, 6 Pri. 203; *Moody* v. *Spencer*, 2 Dowl. & Ryl. 7. See farther as to solicitors' liens, Cov. Pow. Mortg. 1063; Dixon on Title Deeds, 321). In a late case, Lord *Eldon* refused to order a solicitor to produce papers in a cause, from the conduct of which he had been dismissed, unless he was paid his costs. *Lord* v. *Wormleighton*, Jacob, 580. But the rule is otherwise, where the refusal to proceed is on the part of the solicitor, *Commerall* v. *Poynton*, 1 Swans. 1, in which case his lien, and, it should seem, his claim generally for his costs in the cause are gone. *Creswell* v. *Byron*, 14 Ves. 271.

COPYHOLDS IN TRUST FOR SALE. SECURITY TO A SOLICITOR.

those now in being, or not. PROVIDED ALSO, *and it is hereby declared and agreed*, and particularly the said [*mortgagor*], for himself, his heirs, executors, and administrators, doth hereby covenant, declare, and agree, with and to the said [*mortgagee*], his heirs, executors, administrators, and assigns, that, in case default shall happen to be made in payment of the said principal sum of £——, or of the interest thereof, or of any part of the same respectively, according to the true intent and meaning of the proviso hereinbefore mentioned and referred to, and the covenant hereinbefore contained for payment thereof, or either of them, then and in such case it shall be lawful for the said [*mortgagee*], his heirs or assigns, and he and they is and are hereby authorized and empowered, at any time after the expiration of one calendar month next after any such default shall have been made, without any further consent of, or authority from, the said [*mortgagor*], his heirs or assigns, absolutely to sell and dispose of the said —— and premises surrendered to the said [*mortgagee*], his heirs and assigns, as aforesaid, with their and every of their appurtenances, either together or in parcels, and either by public sale or private contract, to any person or persons whomsoever, with liberty, if he or they shall think proper, to purchase in the same hereditaments, or any of them, and again sell the same as aforesaid, without being responsible for any loss or losses that may be occasioned thereby; and to surrender or otherwise assure the same premises to the purchaser or purchasers thereof, his, her, or their heirs and assigns, as he or they shall direct, freed and absolutely discharged of and from all equity and right of redemption whatsoever, of or by him the said [*mortgagor*], his heirs or assigns, or any person or persons lawfully or rightfully claiming or to claim from or under him, them, or any or either of them: *And it is hereby declared*, that the receipt or receipts of the said [*mortgagee*], or his heirs or assigns, or of his or their agent thereunto lawfully authorized, for the monies to be received on any such sale or sales as aforesaid, or from the rents and profits in the mean time, shall effectually discharge the person or persons paying the same from all responsibility in respect of the application thereof, and that the purchaser or purchasers of the

Power of sale in default of payment.

Receipts of mortgagee to discharge purchasers.

said hereditaments shall not be obliged to inquire whether any default shall have been made in payment of the monies hereby intended to be secured, according to the covenant and proviso respectively hereinbefore contained and referred to, nor shall be affected by express notice from the said [*mortgagor*], his heirs, executors, administrators, or assigns, that no such default had been made, and that the said sale or sales was or were unnecessary and improper; *And it is hereby declared and agreed*, by and between the said parties to these presents, that the said [*mortgagee*], his heirs or assigns, shall and will apply and dispose of the monies arising from the said sale or sales, in the first place (after deducting the costs attending the same, and all other incidental expenses,) in payment and satisfaction of the said principal sum of £——, together with all interest that shall be then due for the same, without any deduction or abatement whatsoever; and after full payment and satisfaction of the said principal and interest monies, costs, and expenses, hereinbefore mentioned, shall and will pay over the clear residue or surplus of such purchase monies (if any) unto the said [*mortgagor*], his heirs, executors, administrators, or assigns; and, at the cost and charges of the said [*mortgagor*], his heirs or assigns, surrender and assure all such parts of the said hereditaments and premises (if any) as shall not have been sold and disposed of under the power hereinbefore contained, unto him or them, or as he or they shall direct or appoint, and cause satisfaction to be acknowledged on the rolls or records of the court of the said manor. (*Proviso and declaration that mortgagee's right of foreclosure shall not be affected, ut ante*, p. 263). And the said [*mortgagor*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*mortgagee*], his heirs and assigns, that he the said [*mortgagor*], at the time of making the surrender hereinbefore recited, had good right and absolute authority to surrender the said —— so surrendered as aforesaid to the use of the said [*mortgagee*], his heirs and assigns, in manner hereinbefore recited, and according to the true intent and meaning of the said surrender; *And also*, that (subject to the proviso and declaration hereinafter contained,

COPYHOLDS IN TRUST FOR SALE. SECURITY TO A SOLICITOR.

Covenant by mortgagor that he had good right to surrender.

For quiet enjoyment after de-

COPYHOLDS IN TRUST FOR SALE. SECURITY TO A SOLICITOR.

it shall be lawful for the said [*mortgagee*], his heirs and assigns, from time to time, and at all times after he or they shall have been admitted to the said copyhold hereditaments and premises, peaceably and quietly to enter into or upon, and hold and enjoy the said hereditaments, and to take the rents and profits of the same, without any eviction, interruption, or denial whatsoever, from or by the said [*mortgagor*], his heirs or assigns, or any person or persons whomsoever, except in respect of the interests hereinafter excepted; *And that* free and clear, or freely, clearly, and absolutely discharged, or by the said [*mortgagor*], his heirs, executors, or administrators, effectually kept indemnified from or against all former or other estates, rights, titles, charges, and incumbrances whatsoever, except the rents and services therefore due and of right accustomed to the lord of the said manor; *And also*, that the said [*mortgagor*], and his heirs, and every person whosoever, having or rightfully claiming or to claim any estate, right, title, or interest at law or in equity, in or to or out of the said ——, or any part thereof, except only in respect of the interests hereinbefore excepted, will or shall at any time, and from time to time, upon every reasonable request of the said [*mortgagee*], his heirs, executors, administrators, or assigns, and at the costs and charges of the said [*mortgagor*], his heirs or assigns, until the said hereditaments and premises shall be sold and conveyed under the power of sale hereinbefore contained, and afterwards at the costs and charges of the purchaser or purchasers thereof, his, her, or their heirs or assigns, make, execute, and perfect every such lawful and reasonable surrender and assurance in the law whatsoever, for more effectually surrendering, releasing, or otherwise assuring the said hereditaments and premises, and every part of the same, with their appurtenances, to the use of the said [*mortgagee*], his heirs or assigns, or as he or they shall direct, according to the true intent and meaning of these presents, as by the said [*mortgagee*], his or her heirs, executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably advised and required. (*Declaration that mortgagor shall enjoy until default, ut ante*, p. 265.) IN WITNESS, &c.

And for further assurance.

MORTGAGE *in Fee by* APPOINTMENT *and* RELEASE, *for the Purpose of* RAISING *Money to* PAY *the* DEBTS *of the last* OWNER, *who devised the Lands to the present Mortgagor charged with Debts.*

TO RAISE MONEY TO PAY DEBTS OF DEVISOR.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*mortgagor*], of &c., of the one part; and [*mortgagee*], of &c., of the other part. WHEREAS [*testator*], of ——, deceased, in and by his last will and testament in writing, bearing date on or about the —— day of ——, duly executed as the law prescribes for the devise of freehold estates, devised in the words or to the effect following, that is to say, "First, I direct that all my just debts and funeral and testamentary expenses shall be paid (*a*),

Parties.

Recital of will of testator.

(*a*) Whether general words to this effect operated to charge the real estate subsequently devised, has long been *vexata quæstio*. (See cases stated 2 Jarm. on Devis. 645, 653). The preponderance of the early decisions certainly is in favour of the charge, and this doctrine has been confirmed in several recent adjudications stated in the work referred to, to which may now be added the late case of *Ronalds* v. *Feltham*, 1 Turn. & Russ. 418; where a testator commenced his will in these words: "First, I direct all my just debts and funeral expenses to be fully paid and satisfied;" and then he proceeded to dispose of all his copyhold, freehold, and leasehold estates, and all his other property, among his wife and children. Sir *T. Plumer*, M. R., held, that the real estate (which consisted of copyholds) was charged. "The testator" said his Honor, "has blended all his real and personal estate into one fund, which he gives to his wife, and after her death to his children, but he has previously directed that his debts should be first paid. Until these debts were paid, it could not have been his intention that the subsequent disposition should take effect. It was said in the argument that the word 'first' in this will was nothing more than the ordinary technical form of introductory words; in reference to that suggestion, I have to observe, that here it is not followed by other words denoting succession, such as secondly, thirdly," &c.

Whether a general direction to pay debts charges real estate devised.

Affirmative decided in *Ronalds* v. *Feltham*.

TO RAISE MONEY TO PAY DEBTS OF DEVISOR.

and I give and devise all my messuages, lands, tenements, and hereditaments, and all other my real estate whatsoever

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The reliance placed on the words "first," "in the first place," &c., in this and some of the other cases, tends to introduce great uncertainty into the doctrine. No such words occurred in *Clifford* v. *Lewis*, 6 Madd. 313; and yet Sir *J. Leach* held the general expressions occurring at the commencement of the will to charge the real estate; his Honor observing, that, though not expressly, yet in fact the testator had directed his debts to be *first* paid; (the direction being in the commencement of the will). The general principle of the rule, however, seems to be this: that, as the personalty was subject to the debts without any direction to pay them, the testator could not have had that species of property in view, but must have intended to onerate the realty devised by the will; and, thus considered, it seems to be totally immaterial what is the local position in the will of the direction to pay the debts (unless it be so connected with the gift of the personal estate as to be confined to that), or whether it be accompanied by the words "first," or "in the first place," &c. If the rule is to turn on such phrases, the slightest variation of expression will ever be considered as raising a new case for adjudication, and numerous petty distinctions will be established, producing mischievous uncertainty upon a point which, from its frequent occurrence, it is important should be settled upon a broad and intelligible principle.

Principle of the rule.

Mortgagees, &c. not bound to see charged debts paid.

In regard to purchasers and mortgagees, indeed, the question, whether debts are charged on the real estate or not, is generally rendered unimportant, by the rule which exempts them from seeing to the application of the purchase or mortgage money; which rule, it is well known, extends also to legacies, *where there is a general charge of debts;* for, as the assets are not applicable to the payment of the legacies until the debts are paid, to require a purchaser or mortgagee to see to the payment of the legacies, would virtually involve him in the application of the fund to the liquidation of the debts. Where, therefore, lands charged with debts and legacies, or with debts alone, are afterwards sold or mortgaged by the devisee, the purchaser or mortgagee is not liable to be affected by the charge, as it will be presumed (unless the contrary appear) that the money was raised and applied for the purposes of the charge. If, however, the deed affords internal evidence that the money was raised for another purpose, no such inference arises, and the estate will remain liable to the charge in the hands of the purchaser or mortgagee. Thus, in a late case, a testator charged his real estate with two legacies of 1,000*l.* to A. and B., to be vested immediately on his decease, but to be paid to them on their attaining twenty-one, and gave his real and personal estate, *subject to his debts and funeral and testamentary expenses,* to his wife. A. and B. died infants in

But, if the sale or mortgage is avowedly made for other purposes, the estate continues liable.

and wheresoever, to such uses, upon such trusts, and for such estates, intents, and purposes, as my son [*mortgagor*]

TO RAISE MONEY TO PAY DEBTS OF DEVISOR.

1803 and 1819. The testator's widow married C., and, on her marriage, the property was settled to such uses as she should appoint. In 1816, she and her husband, by the exercise of her power of appointment, mortgaged to H. for securing 4000*l.* The deed recited that the husband had occasion for the money, and, throughout, treated the transaction as a loan to him. The wife afterwards appointed the estate, subject to the mortgage, to her husband in fee; he charged it with a further sum to H., then re-conveyed it to the wife's appointment; and they afterwards joined in conveying it upon trust for sale. The trustee sold to one of the defendants. The two legacies of 1000*l.* not having been paid, the next of kin of A. and B. filed a bill against the testator's widow and her husband, H., the mortgagee, the trustee for sale, and purchaser, claiming the legacies as a subsisting charge on the estate in question. Sir *J. Leach*, V. C., observed, that it had been contended, that this real estate, being primarily charged with the debts of the testator, the mortgagee was not bound to look to the satisfaction of the legacies. "As a general principle," said his Honor, "this proposition cannot be questioned. So, a mortgagee or purchaser from the executor of a part of the personal property of the testator, has a right to infer that the executor is, in the mortgage or sale, acting fairly in the execution of his duty, and is not bound to inquire as to the debts or legacies. But, if the nature of the transaction affords intrinsic evidence that the executor, in the mortgage or sale, is not acting in the execution of his duty, but is committing a breach of trust, as where the consideration of the mortgage or sale is a personal debt due from the executor to the mortgagee or purchaser, then such mortgagee or purchaser, being a party to the breach of trust, does not hold the property discharged from the trusts, but equally subject to the payment of the debts and legacies, as it would have been in the hands of the executor*. The same principle is applicable to real estate; and the question is, whether the transactions in question did not afford intrinsic evidence that the mortgages to the defendant were not made by C. and wife, in order to pay the charges created on the estate by the will of the testator, but for other purposes, which amounted to a breach of trust. In the mortgage deed for 4000*l.*, it is expressly stated, that the money is raised because the husband had occasion for it, and he alone signs the receipt for the consideration. The mortgagee had therefore notice, from the intrinsic evidence of the transaction, that this sum was not to be applied in satisfaction of the charges under the testator's will. Before the lending of the second sum of 2000*l.*, C. had, by the appoint-

Mortgagee or purchaser from executor not bound to inquire as to debts or legacies, but is liable for a breach of trust of which he has notice.

* See this subject fully discussed, *post*, Vol. 6, p. 292.

TO RAISE MONEY TO PAY DEBTS OF DEVISOR.

shall by deed or will, to be attested by two witnesses, direct or appoint; and in default of such direction or ap-

ment of his wife, acquired the legal fee of the estate, subject to the first mortgage. And the second sum of 2000*l.* is a mere personal loan to him, having no colour or connection with the charges on the testator's estate. I am of opinion, therefore, that the defendant, the mortgagee, was a party to the breach of trust committed by these mortgages; and that the plaintiffs are entitled to a decree." *Watkins* v. *Cheek*, 2 Sim. & Stu. 199.

Claims of creditors by virtue of devises upon trust, when not barred by the statute of limitations.

This doctrine is very important to purchasers and mortgagees; and the more so, since it has been recently decided that the statute of limitations ceases, at the death of the testator, to run on debts for the payment of which the testator has created a trust fund; upon the principle that "it is not to be inferred, that a man has no debt because he does not go to law to enforce payment, when he has a trustee to pay him." *Hughes* v. *Wynne*, 1 Turn. & Russ. 307. It is no objection, therefore, to the claim of a simple contract creditor upon such a fund, that six years have elapsed since the testator's decease, without demand or acknowledgment*; though equity would require that this, as in the case of all other claims, should be made in a reasonable time. In *Hughes* v. *Wynne*, it is to be observed, that the devise was expressly upon trust to sell and pay debts; but probably the principle would be held to apply to a mere charge, such a charge being in equity, for most purposes, equivalent to a direct devise.

But a devise to pay debts does not revive a debt already barred.

It is clear, however, that a charge of, or devise for payment of debts, does not revive a debt which was actually barred by the statute, at the testator's decease; *Burke* v. *Jones*, 2 Ves. & Bea. 275; nor does such a devise or charge make a debt carry interest; Earl of *Bath* v. Earl of *Bradford*, 2 Ves. senr. 363, 587; *Lloyd* v. *Williams*, 2 Atk. 110; *Shirley* v. Earl *Ferrers*, 1 B. C. C. 41; *Creuze* v. *Hunter*, 2 Ves. jun. 159; see also *Maxwell* v. *Wettenhall*, 2 P. W. 26, Cox's n.; unless where a testator charges debts not his own, in which case it seems the Court will regard them as legacies, and will give interest at 4 *per cent.*; and if they are simply charged upon the real fund, and do not involve the administration of the personalty, the interest will be payable from the death. *Short* v. *Westley*, 16 Ves. 393.

Suggestion as to mode of preparing mortgage of lands which have been charged with debts.

To return, however, to the point more immediately under consideration: It should be observed, that, where a testator has charged his real estate with debts, but, the personal estate being sufficient to satisfy them, the lands are not wanted, and the devisee sells or mortgages for his own benefit, this

* An acknowledgment, to take a debt out of the statute, must now be in writing. See Lord *Tenterden's* act, 9 Geo. 4, c. 14, stated *ante*, Vol. 1, p. 329 *a*, 2nd edit.

pointment, *To the use* of the said [*mortgagor*], his heirs and assigns, for ever; (*Recite death of testator, &c., ut ante*, Vol. 4, p. 234). AND WHEREAS the personal estate of the said testator was insufficient to discharge the simple contract debts due and owing from him at the time of his decease; AND WHEREAS the said [*mortgagor*] has been advised that the terms in which the said testator directed his debts to be defrayed, would, according to the true construction of the said will, have the effect of charging such debts upon his real estate devised to the said [*mortgagor*], as hereinbefore recited; AND WHEREAS the said [*mortgagor*], being desirous to raise the sum of £——, for the purpose of enabling him to pay the debts of the said [*testator*], the testator, remaining unsatisfied out of his personal estate as aforesaid, hath requested the said [*mortgagee*] to lend and advance him the same at interest, on security of the said devised hereditaments, which he the said [*mortgagee*] hath consented and agreed to do. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the said sum of £—— of lawful money of the United Kingdom to the said [*mortgagor*] in hand well and truly paid by the said [*mortgagee*] at or immediately before the execution of these presents,

TO RAISE MONEY TO PAY DEBTS OF DEVISOR.

That personalty is insufficient to pay testator's debts.

Mortgagor advised that the real estate is charged.

Recital of agreement for loan.

Testatum.

In consideration of mortgage money.

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fact should not be recited, and nothing should be stated to shew that the sale or mortgage is not made for the purpose of rendering the property available to the purposes expressed, as to the charge. In such a case, the best mode is to make no recital as to the purposes of the loan, and then the presumption would be in favour of the legal propriety of the transaction. If, instead of selling or mortgaging, the devisee settles the land (as sometimes happens), the property, we have seen, continues liable to the claim of the creditors, and no marketable title can be made to it for a great length of time, as the fact of there not being unsatisfied debts is not susceptible of positive proof. The objection can only be removed by a suit in equity, and the Editor's recent experience has brought a case to his notice in which a title was rejected on this ground. If the lands to be mortgaged have been charged with legacies alone, the mortgagee must see his money applied in payment of them, or the legatees must release their claims. If he neglect to do so, and the property is afterwards taken from him by a legatee, he will not even be allowed his costs. *Shackleton* v. *Shackleton*, 2 Sim. & Stu. 242.

Mischievous consequences of settling lands which have been charged with debts.

TO RAISE MONEY TO PAY DEBTS OF DEVISOR.

the receipt of which said sum of £—— the said [*mortgagor*] doth hereby acknowledge, and from the same and every part thereof doth acquit, release, and discharge the said [*mortgagee*], his heirs, executors, administrators, and assigns, he the said [*mortgagor*], by virtue and in pursuance of the power or authority given and reserved to him in and by the said hereinbefore in part recited will, and also of every other power and authority enabling him in his behalf, *Doth*, by this present deed, sealed and delivered by him in the presence of, and attested by the two credible persons whose names are hereupon indorsed as witnesses, attesting the execution of these presents by the said [*mortgagor*], direct, limit, and appoint, That all and singular the messuage or dwelling-house, piece or parcel of land and hereditaments hereinafter described, and hereby released or otherwise assured, or intended so to be, with their and every of their appurtenances, shall henceforth remain, continue, and be and enure To THE USE of the said [*mortgagee*], his heirs and assigns, for ever, subject, nevertheless, to the proviso or agreement for redemption hereinafter contained: AND THIS INDENTURE ALSO WITNESSETH, that, for the considerations hereinbefore expressed, and by way of auxiliary or secondary assurance only, he the said [*mortgagor*] *Hath* granted, bargained, sold, and released, and by these presents *Doth* grant, bargain, sell, and release unto the said [*mortgagee*], his heirs and assigns (in the actual possession of the said [*mortgagee*], *&c.*, *ut ante*, p. 249), ALL THAT messuage or dwelling-house situate and being, &c., and now in the tenure or occupation of ——, and ALL THAT piece or parcel of land thereunto adjoining, and containing by estimation, &c.; *And all* [houses, outhouses, edifices, buildings, cellars, vaults, areas, courts, court-yards, woodhouses, pumps, cisterns, gardens, ways, paths, passages, trees, woods, underwoods, commons, hedges, ditches, fences, waters, water-courses, rights, liberties, privileges, easements, profits, commodities, advantages, and] appurtenances whatsoever to the said messuage or dwelling-house, piece or parcel of land, hereditaments, and premises, hereby released or otherwise assured, or intended so to be, or any of them respectively belonging or in anywise appertaining, or accepted, reputed, deemed, taken, or

Mortgagor, by virtue of his power,

appoints

hereditaments after described,

To the use of mortgagee in fee.

Second *testatum*.

Mortgagor releases to mortgagee.

Parcels.

General words.

known, held, used, occupied, possessed, or enjoyed, as part, parcel, or member of the same or any of them respectively: *And* all deeds, evidences, and writings, relating to the said hereditaments and premises, or any part thereof, now in the custody of the said [*mortgagor*], or which he can procure without suit: To HAVE AND TO HOLD the said messuage or dwelling-house, piece or parcel of land, hereditaments, and all and singular other the premises hereby released or otherwise assured, or intended so to be, with their and every of their appurtenances, unto the said [*mortgagee*], his heirs and assigns, To THE USE of the said [*mortgagee*], his heirs and assigns, for ever, subject, nevertheless, to the proviso or agreement for redemption next hereinafter contained, (that is to say); *(add proviso for redemption, and covenants, ut ante,* p. 257, *et seq.)*

TO RAISE MONEY TO PAY DEBTS OF DEVISOR.

And all deeds.

Habendum.

MORTGAGE *by* APPOINTMENT *and* GRANT *of a* FEE-FARM-RENT, *to* SEVERAL MORTGAGEES, *with usual Covenants.* DECLARATION *that* MORTGAGEES *have* ADVANCED *their* MONEY *in* CERTAIN PROPORTIONS (*a*). *(Variation where* PRINCIPAL *is to be repaid by* INSTALMENTS).

FEE-FARM-RENT TO SEVERAL MORTGAGEES ADVANCING IN CERTAIN SHARES.

THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—, BETWEEN [*mortgagor*], of &c., of

Parties.

(*a*) Where several persons contribute to advance money on the same estate, intending that none of them shall acquire any relative priority, the two most usual modes of effecting this object, are either to limit to each an aliquot share of the estate, proportioned to his share of the money (as in the next precedent), or for a mortgage of the entire estate to be made to all the mortgagees as joint tenants, or to a trustee for them (such trustee being either one of the persons advancing the money, or a stranger), with a declaration (*ut post*), that the mortgage money is advanced by the several persons in question, in certain proportions; and this, it is obvious, is the only method where (as in the precedent *supra*), the sums advanced

Modes of proceeding where money is advanced by several.

FEE-FARM-RENT TO SEVERAL MORTGAGEES ADVANCING IN CERTAIN SHARES.

the one part; and [*mortgagees*], of &c., of the other part. WHEREAS, by indentures of lease and release, bearing date respectively on or about the —— and —— days of ——, in the year 1760, the release being of four parts, and made between [A. B.], esquire, of the first part; [C. D.], gent., of the second part; [E. F.], spinster, of the third part; and [G. H.], gent., of the fourth part; ALL THAT messuage, &c., with the appurtenances, were conveyed and assured *To the use, intent, and purpose*, that the said [C.D.], his heirs and assigns, for ever, should receive and take the yearly rent or annual sum of £—— to be issuing and payable out of the said hereditaments and premises thereby assured, such rent to be paid on the feast day of St. Michael the Archangel, in each and every year; with such power of distress and entry, limited by way of use, in case the same rent should be behind and unpaid for the space of thirty days after any or either of the said annual days of payment, as are contained in the said indenture of release: AND WHEREAS, by divers assurances or other means effectual in the law, the said yearly fee-farm-rent became vested in [A. Z.], gent., as the absolute owner thereof in fee-simple; AND WHEREAS, by an indenture of grant, bearing date on or about the —— day of ——, 18—, and made between the said [A. Z.], of the first part; the said [*mortgagor*], of the second part; and [*his trustee*], of the third part; the said fee-farm-rent or

Recital of deed creating the fee-farm-rent.

That by divers assurances rent became vested in A. Z.

—Of conveyance to mortgagor.

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are not easily reducible into aliquot shares, as moieties, thirds, twelfths, &c. The two modes of mortgaging, which have been suggested, are attended with different consequences in several important particulars. In the first case, the deed operates as two distinct mortgages, and a bill for foreclosure would, it is conceived, lie by either party in respect of his share in the estate: in the latter case, however, it has been decided that a suit cannot be maintained by one of the persons entitled to a proportion of the money, for a foreclosure of a proportional part of the estate, but all the persons entitled to the money must be before the Court. *Palmer* v. Earl of *Carlisle*, 1 Sim. & Stu. 423.

It should be observed, that the Stamp Act, 55 Geo. 3, c. 184, *post*, Vol. 6, p. 255, imposes several stamps where the mortgage is made to secure the payment to different persons of distinct sums of money, and not one stamp upon the aggregate amount.

annual sum of £——, and all powers and remedies for the recovery of the same, were conveyed and assured, and now stand limited to such uses, for such estate or estates, and charged and chargeable in such manner and form as the said [*mortgagor*] by any deed or deeds in writing, with or without power of revocation, duly executed, should from time to time direct or appoint, and in default of any such direction or appointment, *To the use* of the said [*mortgagor*], and his assigns, for his life, with remainder *To the use* of the said [*trustee*], and his heirs, during the natural life of the said [*mortgagor*], in trust, nevertheless, for the said [*mortgagor*], and his assigns, with remainder *To the use* of the said [*mortgagor*], his heirs and assigns, for ever. AND WHEREAS the said [*mortgagor*] being desirous to borrow and take up at interest the sum of five hundred pounds, hath applied to and requested the said [*mortgagees*] to lend and advance him the same at interest, on the security of the yearly fee-farm-rent hereinbefore mentioned, which they the said [*mortgagees*] have consented and agreed to do (*b*). NOW THIS INDEN-

FEE-FARM-RENT TO SEVERAL MORTGAGEES ADVANCING IN CERTAIN SHARES.

—Of agreement for loan.

Testatum.

(*b*) If a person seised in fee of lands grants an original rent-charge out of them for the purpose of raising money by mortgage, the present deed should be varied, by reciting the seisin of the ancestor, and the intention to grant a rent-charge to the mortgagee, &c. The *testatum* will be similar to that given, *ante*, Vol. 4, p. 229, with due variations adapted to the different nature and object of the instrument. The proviso for redemption, and the covenants by the mortgagor, that he stands seised, has power to charge the lands, for quiet enjoyment after default, and for further assurance, will be in the ordinary terms.

Distinction where the mortgagee takes an original rent-charge.

Where a mortgagee advances money on a subsisting rent-charge, he should, of course, have the deeds creating and subsequently granting the rent delivered up to him, as in other cases. Where he takes as a security a rent-charge created *de novo* out of the mortgagor's lands, he should either have the deeds relating to the lands delivered to him, or they should be deposited with a third person for the common benefit of the mortgagor and mortgagee; or at least a memorandum of the creation of the charge should be indorsed on the principal conveyance, in order that any person claiming under the mortgagor, derivatively through such conveyance, might have notice of the charge.

As to the custody of title deeds, in the case of a mortgage of a fee-farm-rent.

An objection would exist to a mortgage-security by means of a rent-charge, whether antecedently existing, or created *de novo*, if the doctrine

Remarks upon the doctrine

FEE-FARM-RENT TO SEVERAL MORTGAGEES ADVANCING IN CERTAIN SHARES.

Mortgagor, in consideration, &c.

TURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of five hundred pounds of lawful money of Great Britain and Ireland paid by the said [*mortgagees*] to the said [*mortgagor*] at or immediately before the execution of these presents, the receipt of which said sum of five hundred pounds he the said [*mortgagor*] doth hereby acknowledge, and from the same doth acquit, release, and discharge the said [*mortgagees*], their heirs, executors, administrators, and assigns, he the said [*mortgagor*], in exercise and execu-

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that a rent-charge is redeemable at any time.

advanced in some of the early cases could be sustained, that a rent-charge is redeemable by the mortgagor *at any time*. In *Widdrington* v. *Jennings*, cit. 1 P. W. 270, Lord *Harcourt* is said to have taken such a difference between a mortgage of a rent-charge and of land, as to have allowed of redemption by the mortgagor in the former case, after eighty years. But, in *Floyer* v. *Lavington*, 1 P. W. 268, Lord *Cowper* thought the rule had been carried too far, and refused to allow the mortgagor of a rent-charge to redeem after sixty years; his Lordship, however, adverting to the special circumstances, one of which was, that the rent-charge was less than the interest. Lord *Hardwicke*, in *Mellor* v. *Lees*, 2 Atk. 495, also alluded to the distinction between a mortgage of land and a rent, observing, that though the Court would not suffer a plain and common mortgage to be redeemed, where the mortgagor had been in possession of the rents and profits for a considerable time, because it would be making the mortgagee a bailiff to the mortgagor, *yet, in the case of a rent-charge, there would be no such inconvenience, as the person might easily account.*

The notion upon which this distinction is founded would be less exceptionable, if it were inevitably certain that the whole amount of the rent conveyed to the mortgagee actually reached his hands; but, it is obvious that circumstances may happen, without any laches on the part of the mortgagee, to render it impossible that he should receive the whole; as, by the default of tenants, and the inadequacy of the value of the premises to bear the arrear created by such default, with the expenses consequent on enforcing the payment. In such cases it would evidently be a hardship on a mortgagee, for the period of nearly a century, to be obliged to preserve vouchers and give explanations of these circumstances, in order to discharge himself from being liable to the whole. On this ground, and considering the disinclination of Courts of Equity to unravel very old transactions, it is doubtful whether the doctrine would now be acted upon. The fact, however, that it has been broached, affords an *additional* reason (for *some* reason there always is) for requiring a power of sale, where the security consists exclusively of a fee-farm-rent.

FEE-FARM-RENT TO SEVERAL MORTGAGEES ADVANCING IN CERTAIN SHARES.

tion of the power or authority limited and reserved to him in and by the said hereinbefore in part recited indenture of release, and also of every other power or authority enabling him in this behalf, *Doth* hereby absolutely and irrevocably direct, limit, and appoint, that *All that* the said yearly fee-farm-rent, or annual sum of £——, so as aforesaid created and limited by and in the said hereinbefore in part recited indentures of lease and release, of or about the —— and —— days of ——, 1760, together with all powers and remedies by distress, re-entry, or otherwise, for the recovery of the same or any part thereof, shall remain, continue, and be, and that the said hereinbefore in part recited indenture of release of the —— day of ——, 1810, shall henceforth operate and enure, To THE ONLY PROPER USE of the said [*mortgagees*], their heirs and assigns, for ever, subject, nevertheless, to the proviso or agreement for redemption hereinafter contained. AND THIS INDENTURE FURTHER WITNESSETH, that, for the considerations hereinbefore expressed, he the said [*mortgagor*] *Hath* granted, bargained, sold, and confirmed, and by these presents *Doth* grant, &c., unto the said [*mortgagees*], their heirs and assigns (*a*), ALL THAT the said yearly fee-farm-rent, or annual sum of £—— hereinbefore appointed or otherwise assured, or intended so to be, and all powers and remedies hereinbefore mentioned for the recovery of the same; *And all* the estate, right, title, interest, use, trust, inheritance, property, possession, benefit, claim, and demand whatsoever, both at law and in equity, or otherwise howsoever, of him the said [*mortgagor*], of, in, to, out of, or upon the said yearly fee-farm-rent, or annual sum, and premises hereby appointed and granted or otherwise assured, or intended so to be, *Together with all* deeds, evidences, writings, and muniments of title, and attested or other copies of deeds, evidences, and writings relating to or anywise concerning the said yearly fee-farm-rent, or annual sum, and premises hereby appointed and granted, or intended so to be, now in the

Appoints the fee-farm-rent.

To the use of mortgagees in fee, subject to proviso for redemption. Second *testatum*.

Mortgagor releases to mortgagee the rent.

All the estate, &c.

Together with deeds, &c.

(*a*) The rent being an *incorporeal* hereditament, no lease for a year is necessary.

FEE-FARM-RENT TO SEVERAL MORTGAGEES ADVANCING IN CERTAIN SHARES.

custody or power of the said [*morgagor*]: To HAVE AND TO HOLD, receive, perceive, take, and enjoy the said yearly fee-farm-rent, or annual sum of £——, and all and singular other the premises hereby appointed and granted and confirmed, or otherwise assured, or intended so to be, unto and by the said [*mortgagees*], their heirs and assigns, *To the only proper* use of the said [*mortgagees*], their heirs and assigns, for ever, *subject nevertheless* to the proviso or agreement for redemption hereinafter contained, (that is to say),

Habendum.

To the use of mortgagees in fee.

Proviso for redemption.

PROVIDED ALWAYS, and it is hereby declared and agreed by and between the said parties hereto, that, if the said [*mortgagor*], his heirs, executors, administrators, or assigns, do and shall well and truly pay or cause to be paid unto the said [*mortgagees*], their executors, administrators, or assigns, at &c., the sum of £—— of lawful money of Great Britain and Ireland, with interest for the same after the rate of 5*l.* for every 100*l.* by the year (*b*), upon the —— day of —— now next ensuing, without making any deduction or abatement whatsoever, [according to the condition of a certain bond or obligation of the said [*mortgagor*], bearing even date with these presents, given for securing the payment of the same sum and interest (*c*)], then these presents, and every article, matter, and thing

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(*b*) If the principal money is to be payable by instalments, vary the terms of the proviso as follows:—

Variation, where the principal money is to be repaid by instalments.

"at the respective days or times and in the manner following, that is to say, the sum of £——, part of the said principal money, on the —— day of —— next ensuing the date of these presents; the sum of £——, other part of the said principal sum, on the —— day of ——, which will be in the year ——; and the sum of £——, the residue of the principal sum of £——, on the —— day of ——, which will be in the year ——, with interest in the mean time, after the rate aforesaid, on so much of the said principal sum of £—— as shall from time to time remain unpaid, such interest to be payable by even portions half yearly, on the —— day of ——, and the —— day of ——, in every year, without making any deduction," &c.

(*c*) But, as to mortgage-bonds, *vide ante*, p. 235.

herein contained, [and also the said bond hereinbefore referred to], shall cease and be void to all intents and purposes whatsoever, any thing herein [or in the said bond] contained to the contrary thereof in anywise notwithstanding (*d*). And the said [*mortgagor*] doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the said [*mortgagees*], their executors, administrators, and assigns, that he the said [*mortgagor*], his heirs, executors, or administrators, will pay or cause to be paid unto the said [*mortgagees*], their executors, administrators, or assigns, the said principal sum of £—— and the interest thereon, on the day and time (*e*) and in manner hereinbefore appointed for payment of the same, without any deduction or abatement whatsoever. And the said [*mortgagor*] doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said [*mortgagees*], their heirs and assigns (*f*), in manner following; that the said hereinbefore in part recited power of appointment hereby exercised, or intended so to be, is a good, valid, and subsisting power, and has not been heretofore exercised, suspended, or in any manner prejudicially affected; *And also* that he the said [*mortgagor*] now hath in himself good right and lawful and absolute authority by these presents to limit and appoint, and also to grant and

FEE-FARM-RENT TO SEVERAL MORTGAGEES ADVANCING IN CERTAIN SHARES.

Covenant by mortgagor to pay mortgage money.

Covenants by mortgagor that power is valid and subsisting.

That he hath power to appoint.

(*d*) If a power of sale is to be added, (as to which, see an observation, *ante*, p. 381), proceed as in the precedent, *ante*, p. 260; varying, of course, the expressions descriptive of the property. The present covenants will be applicable, with the addition of the provisions introduced, where the mortgage is accompanied by a power of sale. Variations.

(*e*) If by instalments, *ut ante*, p. 383—

"at the several days and times."

(*f*) As the covenants for title are intended to run with the land*, they ought in a mortgage in fee to be made with the mortgagee (supposing him to be the releasee or grantee, as well as the *cestui que use*) and his *heirs*, and not, as the covenant to pay the mortgage money, (which is a personal covenant only, *Canham* v. *Rust*, 2 J. B. Moore, 154), with him, his executors or administrators.

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* As to covenants running with the land, *vide ante*, Vol. 4, p. 386.

FEE-FARM-RENT TO SEVERAL MORTGAGEES ADVANCING IN CERTAIN SHARES.

confirm, the said fee-farm-rent or annual sum and premises hereby appointed, granted, and confirmed, or intended so to be, unto and to the use of the said [*mortgagee*], his heirs and assigns, for ever, according to the true intent and meaning of these presents; *And also* that it shall be lawful for the said [*mortgagee*], his heirs and assigns, from time to time and at all times after default shall be made in payment of the said sum of £—— and interest, or any part thereof respectively, contrary to the true intent and meaning of the proviso or agreement for redemption hereinbefore contained, peaceably and quietly to have, hold, possess, and enjoy, and receive and take the said fee-farm-rent or yearly sum of £—— and premises hereby appointed and granted, or intended so to be, and all arrears thereof then due and unreceived, and use and exercise all and singular the powers and remedies reserved or incident by law for the recovery thereof, without any hinderance, interruption, or denial whatsoever, of, from, or by the said [*mortgagor*], his heirs, executors, or administrators, or any other person or persons whomsoever; *And that* free and clear [and freely, clearly, and absolutely exonerated and discharged, or otherwise by him the said [*mortgagor*], his heirs, executors, or administrators, at his and their own costs and charges, sufficiently protected, defended, saved harmless, and kept indemnified of and] from all and all manner of former and other [gifts, grants, mortgages, bargains, sales, jointures, dowers, right and title of dower, uses, trusts, wills, entails, fines, issues, statutes, recognizances, judgments, executions, extents, suits, decrees, debts of record, debts to the King's Majesty or any of his predecessors, sequestrations], estates, titles, troubles, liens, charges, and incumbrances whatsoever; *And moreover*, that he the said [*mortgagor*] and his heirs, and every other person whosoever, lawfully or equitably and rightfully claiming or to claim any estate, right, title, charge, or interest, at law or in equity, or otherwise howsoever, of, in, to, out of, or upon the said fee-farm-rent or annual sum and premises hereby appointed and granted, or intended so to be, or any part thereof, shall and will, from time to time and at all times hereafter, upon every reasonable request of the said [*mortgagee*], his heirs, executors, administrators, and assigns,

For quiet enjoyment after default.

Free from incumbrances.

Further assurance.

but at the costs and charges of the said [*mortgagor*], his heirs, executors, or administrators, make, do, acknowledge, levy, suffer, and execute, or cause or procure to be made, done, acknowledged, levied, suffered, and executed, be the same by fine, common recovery, or otherwise, all such further and other acts, deeds, conveyances, and assurances in the law whatsoever, for more effectually appointing, granting, confirming, or otherwise assuring the said yearly fee-farm-rent or annual sum of £—— and premises hereby appointed and granted, or intended so to be, unto and to the use of the said [*mortgagee*], his heirs and assigns, according to the true intent and meaning of these presents, as by the said [*mortgagee*], his heirs, executors, administrators, or assigns, or his or their counsel in the law shall be reasonably advised or required; PROVIDED ALWAYS, and it is hereby declared and agreed, and the said [*mortgagee*] doth hereby consent and agree, that, until default shall happen to be made in payment of the said sum of £—— and the interest thereof, or of some part thereof, contrary to the true intent and meaning of the proviso or agreement for redemption hereinbefore contained, it shall be lawful for the said [*mortgagor*], his heirs and assigns, henceforth to hold and enjoy and receive and take the yearly fee-farm-rent or annual sum of £—— hereby appointed and granted, or intended so to be, to and for his and their own use (*g*), without any hin-

FEE-FARM-RENT TO SEVERAL MORTGAGEES ADVANCING IN CERTAIN SHARES.

Proviso that mortgagor shall enjoy until default.

(*g*) It is well settled that a mortgagor is not accountable to the mortgagee for the rents he has received, *Colman* v. Duke of *St. Albans*, 3 Ves. 25; *Drummond* v. Duke of *St. Albans*, 5 Ves. 533; see also *Mead* v. Lord *Orrery*, 3 Atk. 244; *Gresley* v. *Adderley*, 1 Swanst. 579, even after forfeiture, nor it seems even after notice from the mortgagee to the tenant to pay the rent to *him;* the doctrine, that the mortgagor is the bailiff, or receiver of the rents for the mortgagee, having been long exploded. *Ex parte Wilson*, 2 Ves. & Bea. 252. But the tenant, paying rent to the mortgagor after notice from the mortgagee, whether the demise were anterior or posterior to the mortgage, *Pope* v. *Biggs*, 9 B. & C. 249; *S. C.* 4 Mann. & Ryl. 193, would clearly be liable to pay it over again to the morgagee. (*Vide ante*, Vol. 4, p. 350, 2nd ed.).

Mortgagor not accountable for by-gone rents.

In settling the accounts between the mortgagor and mortgagee, where the latter has been in possession and receipt of the rents, it often becomes

Principle upon which accounts are settled be-

FEE-FARM-RENT TO SEVERAL MORTGAGEES ADVANCING IN CERTAIN SHARES.

derance, interruption, or denial whatsoever, from or by the said [*mortgagee*], his heirs or assigns, or from or by any other person or persons whomsoever, lawfully claiming through, under, or in trust for him or them, any thing hereinbefore contained to the contrary thereof notwithstanding; AND THIS INDENTURE FURTHER WITNESSETH, that it is hereby declared by the said [*first mortgagee*] and [*second mortgagee*] that the said sum of 500*l.* so lent and advanced by them to the said [*mortgagor*] as hereinbefore expressed, has been lent and

Third *testatum.*

Declaration by mortgagees that monies are advanced by them

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tween mortgagor and mortgagee who has been in possession.

a question of importance, whether the account shall be taken simply by ascertaining the aggregate amount of principal, interest, and costs due to the mortgagee at the period of redemption, on the one hand, and the aggregate amount of rents received by him on the other; or whether rests shall from time to time be made, and interest computed on the balance so ascertained. Where the rents have exceeded the interest, it is obvious that the former mode of settling the account operates greatly in favour of the mortgagee, as the interest runs on the whole principal sum to the time of its complete liquidation; whereas, by making rests from time to time, the surplus rents are applied in gradual reduction of the principal, and the interest is diminished in the same proportion. The rule on this point is, that the Court will adopt one or the other mode of taking the account, as the justice of the case requires. If the interest was *not* in arrear when the mortgagee took possession, the Court will direct rests. *Shepherd* v. *Elliot*, 4 Madd. 254; see also *Robinson* v. *Cummins*, 2 Atk. 410; *Gould* v. *Tancred*, Ib. 534. But, if the interest was considerably in arrear at that time, so that he has himself lost interest by the delay, the Court will not direct annual rests to be taken against him, from the time that the amount of rents received discharged the interest due, though the rents received by him for several years afterwards greatly exceeded the interest. Indeed, it is clear, that the rests cannot be made for a broken period; they must be from the beginning, or not at all; *Davis* v. *May*, Coop. 238; *S. C.* 19 Ves. 383; and they are never made but when the effect upon the whole would be beneficial to the mortgagor; for, to make rests in other cases would be, to give the mortgagee more than the interest on his principal sum, in contravention of the rule which excludes him from compound interest. It has been decided, that the Master cannot make annual rests without a special direction. *Webber* v. *Hunt*, 1 Madd. 111. See also *Donovan* v. *Fricker*, Jacob, 165. If a *mortgagee* remains in possession after his principal and interest are discharged, the Court will compel him to pay interest on the balance. *Quarrell* v. *Beckford*, 1 Madd. 269; *Trimleston* v. *Hamill*, 1 Ball & Beatty, 385.

FEE-FARM-RENT TO SEVERAL MORTGAGEES ADVANCING IN CERTAIN SHARES.

advanced by them out of their own respective proper monies, in the several shares and proportions and in the manner following, (that is to say), the sum of 360*l.*, part thereof, by the said [*first mortgagee*] (*h*), and the sum of 140*l.*, the residue thereof, by the said [*second mortgagee*]; and that the said [*mortgagees*] and their respective executors, administrators, and assigns, shall henceforth separately and distinctly be equitably and beneficially interested in and entitled to the said sum of 500*l.* and the interest thereof, hereby intended to be secured, and in and to the security hereby made [and the said recited bond], and all other securities to be made or entered into for better or more effectually securing the payment of the same sum and interest, or any part thereof respectively, in the several parts, shares, and proportions aforesaid. IN WITNESS, &c.

in certain proportions.

(*h*) If there are three, add,

"the sum of £——, further part thereof, by the said [*second mortgagee*], and the sum of £——, the residue thereof, by the said [*third mortgagee*]."

MORTGAGE *in Fee, by which the Mortgagees* ADVANCING *the* MONEY *in* EQUAL PROPORTIONS (*a*), *the Estate is limited to them in* UNDIVIDED MOIETIES. *(Variation where each Mortgagee takes a* TERM *in* ONE MOIETY *and the* FEE *in the* OTHER). *Mortgage Money paid into the* BANK *of* ENGLAND *in the Name of the* ACCOUNTANT-GENERAL, *pursuant to an Order of the* COURT *of* CHANCERY.

TO MORTGAGEES IN MOIETIES, MONEY PAID BY ORDER OF CHANCERY.

THIS INDENTURE, made, &c., BETWEEN [*mortgagor*], of &c., of the first part; [*first named mortgagee*], of &c., of the second part; and [*secondly named mortga-*

Parties.

(*a*) This precedent, of course, may easily be adapted to the case of the money being advanced in *unequal* shares.

TO MORTGAGEES IN MOIETIES, MONEY PAID BY ORDER OF CHANCERY.

gee], of the third part. *(Reciting proceedings in Chancery in a certain cause, and order for the payment of the mortgage money into the Bank of England).* AND WHEREAS, in obedience to the said hereinbefore recited order, the said [*mortgagees*] have this day paid into the Bank of England, in the name and with the privity of the accountant-general of the said court, in trust in the said cause, the sum of thirty thousand pounds of lawful money of Great Britain and Ireland, as appears by the receipt of [*A.*], one of the cashiers of the said Bank of England, dated this —— day of ——, and by the certificate of the said accountant-general annexed to the said receipt; which said receipt and certificate have been duly filed in the register office of the said court, of which said sum of thirty thousand pounds, fifteen thousand pounds, part thereof, was the proper money of the said [*first named mortgagee*], and fifteen thousand pounds, the remaining part of the said sum, was the proper money of the said [*secondly named mortgagee*], as they hereby respectively declare and acknowledge.

Payment of mortgage money into the Bank, pursuant to an order of Court.

Testatum.

NOW THIS INDENTURE WITNESSETH, that, for and in consideration of the said several sums of fifteen thousand pounds and fifteen thousand pounds, (making together the sum of thirty thousand pounds), so by the said [*mortgagees*] respectively paid into the Bank of England as hereinbefore is mentioned, the payment of which said sums of fifteen thousand pounds and fifteen thousand pounds (making together the said sum of thirty thousand pounds,) the said [*mortgagor*] doth hereby acknowledge, and from the same sums of fifteen thousand pounds and fifteen thousand pounds respectively, and every part thereof respectively, the said [*mortgagor*] doth acquit, exonerate, release, and discharge the said [*mortgagees*] and each of them, their and each of their heirs, executors, administrators, and assigns; And also for and in consideration of the sum of ten shillings of like lawful money paid by the said [*mortgagees*] to the said [*mortgagor*], at or immediately before the sealing and delivery of these presents, the receipt, &c., he the said [*mortgagor*] *Hath* granted, bargained, sold, and released, and by these presents *Doth* &c., unto the said [*mortgagees*], (in their actual possession, &c.), and to their heirs, *(Parcels and general words)*, TO HAVE AND TO HOLD

In consideration of mortgage money advanced by mortgagees in equal proportions—

Mortgagor releases to mortgagees.

Habendum.

the said —— and other the hereditaments and premises hereinbefore described and hereby released, or intended so to be, unto the said [*mortgagees*], and their heirs, to the uses, and subject to the provisoes and agreements herein after expressed concerning the same, (that is to say), As to one undivided moiety or half part or share (the whole into two equal half parts or shares being divided), of and in the said hereditaments intended to be hereby released, and the appurtenances thereunto belonging, TO THE ONLY PROPER USE of the said [*first named mortgagee*], his heirs and assigns for ever; *but subject* to the proviso or agreement hereinafter contained for the redemption of the said undivided moiety or equal half part or share; AND as to the other undivided moiety or equal half part or share (the whole &c.) of and in the said hereditaments intended to be hereby released, and the appurtenances thereunto belonging, TO THE ONLY PROPER USE of the said [*secondly named mortgagee*], his heirs and assigns, for ever; *but subject* to the proviso or agreement hereinafter contained for the redemption of the last-mentioned undivided moiety or equal half part (*b*).

TO MORTGAGEES IN MOIETIES, MONEY PAID BY ORDER OF CHANCERY.

As to one moiety, to the use of first-named mortgagee.

As to the other moiety, to the use of the secondly named mortgagee.

(*b*) It is obvious, that, under the mortgage in the text, the mortgagor might redeem one moiety without the other, by which means the security for the remaining moiety would be of less value. In order to prevent this consequence, and to give to the respective mortgagees a charge upon the entire estate, some gentlemen are in the habit of limiting to each mortgagee an immediate term in one moiety, and the remainder in fee in the other. See Coote on Mortgages, pp. 110, 608. If this scheme be adopted, the limitation of the use, after the *habendum* in fee, will be as follows:—

Variation, where each mortgagee takes a term in one moiety, and a fee in the other.

" As to one undivided moiety or half part of the said hereditaments hereby released, or intended so to be, To THE USE of the said [*first mortgagee*], his executors, administrators, and assigns, for the term of one thousand years hence next ensuing and fully to be complete and ended, without impeachment of waste; *And* after the expiration or sooner determination of the said term, To THE USE of the said [*second mortgagee*], his heirs and assigns, for ever: AND as to the other undivided moiety or half part of the said hereditaments hereby released, or intended so to be, To THE USE of the said [*second mortgagee*], his executors, administrators, and assigns, for the term of one thousand years hence next ensuing and fully to be complete and ended, without

TO MORTGAGEES IN MOIETIES, MONEY PAID BY ORDER OF CHANCERY.

PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said parties to these presents, that, if the said [*mortgagor*], his heirs, executors, or administrators, shall and do, on the —— day of —— next, pay or

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impeachment of waste; And after the expiration or sooner determination of the said term of one thousand years lastly hereinbefore limited, TO THE USE of the said [*first mortgagee*], his heirs and assigns, for ever; PROVIDED ALWAYS, and it is hereby declared and agreed by and between the said parties to these presents, that, if the said [*mortgagor*], his heirs, executors, or administrators, shall, on the —— day of —— next, pay unto the said [*first mortgagee*], his executors, administrators, or assigns, the sum of £—— of &c., with interest for the same &c., at &c., then he the said [*first mortgagee*], his heirs, executors, administrators, or assigns, will, on the request and at the costs and charges of the said [*mortgagor*], his heirs, or assigns, surrender, convey, and assure as well the term of one thousand years hereinbefore limited unto the said [*first mortgagee*], his executors, administrators, and assigns, of and in the said first-mentioned moiety of the said hereditaments hereby released, or intended so to be, as also the freehold and inheritance of and in the last-mentioned moiety thereof, hereinbefore limited to the said [*first mortgagee*], his heirs and assigns, unto the said [*mortgagor*], his heirs and assigns, or as he or they shall direct: PROVIDED ALSO, and it is hereby further declared &c., that, if the said [*mortgagor*], his heirs, executors, or administrators, shall pay unto the said [*second mortgagee*], his executors, administrators, or assigns, the sum of £—— of &c., with interest &c., at &c., then he the said [*second mortgagee*], his heirs, &c., will, on the request &c., convey, surrender, and assure as well the freehold and inheritance hereinbefore limited unto the said [*second mortgagee*], his heirs and assigns, of and in the first-mentioned moiety or half part of the hereditaments hereby released, or intended so to be, subject to the term hereinbefore limited to the said [*first mortgagee*], his executors, administrators and assigns, in the same moiety, as also the said term of one thousand years hereinbefore limited to him the said [*second mortgagee*], his executors, administrators, and assigns, of and in the lastly herein-

Proviso for redemption as to one moiety.

Proviso for redemption as to the other moiety.

TO MORTGAGEES IN MOIETIES, MONEY PAID BY ORDER OF CHANCERY.

cause to be paid unto the said [*first named mortgagee*], his executors, administrators, or assigns, the sum of fifteen thousand pounds of lawful money of Great Britain and Ireland, with interest thereon at the rate of five pounds *per centum per annum* from the date of these presents, without any deduction or abatement whatever, then and in such case, and immediately thereupon, the said [*first named mortgagee*], his heirs or assigns, shall and will, on the request and at the costs and charges of the said [*mortgagor*], his heirs, executors, administrators, or assigns, reconvey and assure the said undivided moiety or equal half part hereinbefore limited to the use of the said [*first named mortgagee*], his heirs and assigns, of and in the said —— and hereditaments hereby intended to be released, unto and to the use of the said [*mortgagor*], his heirs and assigns, or in such other manner as he or they shall direct, free from all charges and incumbrances, to be made or executed by the said [*first named mortgagee*], his heirs or assigns, in the mean time. *(Similar proviso as to the other mortgagee. Add covenant with first named mortgagee to pay* 15,000*l. and interest, and for title, quiet enjoyment, and further assurance as to one moiety; and similar covenants with secondly named mortgagee. The covenants for title, &c., however, may be with both in one clause, in which case the Habendum as well as the limitation of the use, should be to them as tenants in common.)*

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before mentioned moiety or half part of the same hereditaments, unto &c. *(Covenants by mortgagor with each mortgagee to pay his share of mortgage money, and that he has a right to limit one moiety for the term of one thousand years, ut ante,* p. 240, *and the other moiety in fee, &c.*).*"

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* In the present case, as each mortgagee takes a chattel interest in one moiety, and a fee in the other, two sets of covenants for the respective moieties should be entered into, the one adapted to a mortgage by demise, *ut ante,* p. 240; the other to a mortgage in fee, *ut ante,* p. 249. For the sake of brevity, however, the several covenants may be blended together, and the covenant will then be with the mortgagee, his *heirs, executors, administrators,* and *assigns:* which the Courts would construe distributively, namely, that, as to so much of the covenant as related to the term, it was a covenant with the mortgagee, his executors, and administrators, and, as to so much as related to the fee, with him and his heirs.

REVERSION IN FEE TO A TRUSTEE FOR SALE.

CONVEYANCE *by way of* MORTGAGE *of a Reversion in Fee in certain Manors, &c., to a* TRUSTEE (*a*) *of Mortgagee to secure* 5,000*l. and Interest, and if not paid according to the Proviso,* IN TRUST *to* SELL *the Estate and pay the Mortgage Money and Interest.*

Parties

THIS INDENTURE, &c., BETWEEN [*mortgagor*], of &c., of the first part; [*mortgagee*], of &c., of the second

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As to vesting the power of sale in a trustee.

(*a*) It was formerly usual to vest the power of sale in a trustee for the mortgagee, but the practice now is, to give it to the mortgagee himself, without the intervention of a trustee, it being found that the additional protection afforded to a mortgagor by the former mode did not compensate for the inconvenience arising from the estate being outstanding in a third person, who might refuse or become incapable to act; and the increase of expense and trouble often consequent on having another party to the reconveyance, when the mortgage is paid off, or to any suit which might become necessary respecting the estate. Where the power is vested in the mortgagee himself, he is, subject to the purpose of satisfying his own debt, a trustee for the mortgagor; but the Court, it seems, will sometimes restrain a sale by a trustee, when it would not have restrained a mortgagee himself from proceeding to a sale. Thus, in a late case, where a motion was made by the plaintiff, a mortgagor, to restrain the defendant, the mortgagee, from proceeding to a sale of the mortgaged premises, the mortgage deed containing a power of sale, it being alleged that due notice had not been given so as to afford a fair probability of an advantageous sale: the Vice-Chancellor refused the motion, considering that, if the *ex parte* case were true, the plaintiff might relieve himself by giving notice to the purchaser that he had filed a bill to impeach the sale, and that it was better to put him to the inconvenience of an additional party to his suit, than to risk a possible injury to the mortgagee by interrupting the sale. On a subsequent mention of the case, it appeared that the power of sale was in a trustee, and, for this reason, the Vice-Chancellor granted the injunction, the trustee not having apprised the mortgagor of his intention to proceed to a sale, and it being his duty to attend equally to the interest of both *cestui que trusts*, and to apprise

Trustee restrained from selling without notice to the mortgagor.

part; [*trustee*], of &c., of the third part; WHEREAS the said [*mortgagor*] is entitled to the manor, messuages, lands, and hereditaments hereinafter mentioned and expressed to be hereby granted and released, and the inheritance thereof in fee-simple in reversion, expectant upon the decease of [*tenant for life*]; AND WHEREAS the said [*mortgagor*] hath applied to and requested the said [*mortgagee*] to advance and lend him the sum of 5,000*l.*, which the said [*mortgagee*] hath agreed to do, upon having the repayment thereof with interest secured in manner hereinafter mentioned: NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of 5,000*l.* &c. to the said [*mortgagor*] in hand paid by the said [*mortgagee*] &c., the receipt &c., *And also* in consideration of the sum of five shillings &c., to the said [*mortgagor*] paid by [*trustee*], the receipt &c., he the said [*mortgagor*], at the request and upon the nomination of the said [*mortgagee*], (testified by his executing these presents), *hath* granted, bargained, sold, released, and confirmed, and by these presents *doth* &c. unto the said [*trustee*] (in his actual (*b*) possession, &c.), and to his heirs, ALL THAT AND THOSE manor or lordship and capital mansion-house, park, messuages, farm, lands, tithes, rents, tenements, and other hereditaments, situate, lying, and being, or

REVERSION IN FEE TO A TRUSTEE FOR SALE.

Recital that mortgagor is entitled.

Agreement for loan.

Testatum.

Parcels.

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both of the intention of sale, so that each might take the means to procure an advantageous sale. *Anon.* 6 Madd. 10.

A trustee for sale, in common with all other vendors, should have the title of the property investigated, before he enters into a contract for sale*; for his character of trustee does not prevent him from being liable to costs in his suit for specific performance, if he cannot make out a title; though it must be recollected that costs are not *invariably* given against *any* vendor who fails to support his title. *Edwards* v. *Harvey*, Coop. 40. The general rule may, perhaps, be stated the other way, Bishop of *Winchester* v. *Payne*, 11 Ves. 194; *Vancouver* v. *Bliss*, 11 Ves. 458.

Trustee should previously examine his title.

(*b*) As to the practice of conveying reversions by lease and release, *vide ante*, Vol. 4, p. 232.

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* See some observations in regard to this precaution, and the precedent of a contract for sale, framed with a view to the particular circumstances of a title, *ante*, Vol. 1, 2nd ed., pp. 99, 104.

REVERSION IN FEE TO A TRUSTEE FOR SALE.

arising, in the parish of ——, in the county of ——, of or belonging to the said [*mortgagor*], called &c., (subject to the life estate of the said [*tenant for life*] therein),

General words applicable to a manor, &c.

together with all and singular courts-leet, courts-baron, view of frank-pledge, reliefs, heriots, fines, amerciaments, sums of money, goods and chattels of felons, fugitives, felons of themselves, and outlawed persons, deodands, estrays, chief-rents, quit-rents, rents-charge, rents-seck, rents of assize, fee-farm-rents, boons, services, royalties, jurisdictions, franchises; and also all outhouses, edifices, buildings, ways, waters, water-courses, trees, woods, underwoods, hedges, ditches, fences, commons, rights, profits, privileges, easements, advantages, emoluments, and appurtenances to the said manor and other hereditaments belonging or appertaining, or therewith used or enjoyed; And

Habendum.

the reversion &c.; And all the estate &c. To HAVE AND TO HOLD the said manor, messuages, farms, lands, tenements, hereditaments, and all and singular the premises expressed to be hereby granted and released, with their appurte-

Subject to estate for life.

nances (subject, nevertheless, and without prejudice to the estate for life therein of the said [*tenant for life*]), unto

To the use of the trustee.

the said [*trustee*], his heirs and assigns, for ever, To THE USE of the said [*trustee*], his heirs and assigns, for ever; *Upon the trusts*, nevertheless, and for the intents and purposes hereinafter expressed concerning the same, (that is

Upon trust for sale.

to say), *Upon trust* that, in case default shall happen to be made in payment of the said sum of 5,000*l.* or some part thereof, or the interest thereof, at or upon the day or time appointed for the payment of the same in and by the proviso hereinafter contained, contrary to the true intent and meaning of these presents, he the said [*trustee*], his heirs, or assigns, shall and do at any time or times thereafter, either in the life-time or after the decease of the said [*tenant for life*], at the request of the said [*mortgagee*], his executors, administrators, or assigns, but without any further or other authority from or by the said [*mortgagor*], his heirs, or assigns, make sale and absolutely dispose of the said manor, lands, tenements, hereditaments, and premises hereinbefore expressed to be hereby granted and released, or any of them, or any part or parcel thereof, and subject to the life estate therein of the said [*tenant for life*],

if then living, either together or in parcels, and by public sale or auction, or by private contract, unto any person or persons who shall be willing to become the purchaser or purchasers, with liberty to purchase in the said hereditaments, or any part thereof, at any auction or auctions, if he the said [*trustee*], his heirs or assigns, shall think proper, without being responsible for any loss occasioned thereby; And shall and do make and execute all such conveyances and assurances in the law as shall be requisite to effectuate and complete such sale or sales as aforesaid, *And shall and do*, out of the monies to arise from such sale or sales as aforesaid, and the rents and profits which shall have been received by the said [*trustee*], his heirs or assigns, after the said hereditaments shall become saleable under the trust aforesaid, and he and they shall have been required by the said [*mortgagee*], his executors, administrators, or assigns, to enter into the receipt thereof, in the first place pay and satisfy the costs and expenses which he the said [*trustee*], his heirs, executors, administrators, or assigns, shall pay or incur in the execution of the trusts hereby in him and them reposed, And in the next place shall and do pay unto the said [*mortgagee*], his executors, administrators, or assigns, the said principal sum of 5,000*l.* and the interest thereof, or so much of the said principal sum and interest as shall then remain unpaid; And after full payment and satisfaction of the sum of 5,000*l.* and interest, and all such costs and expenses as aforesaid, shall and do pay the surplus, if any, of the monies to arise by such sale or sales, and such rents and profits as aforesaid, unto the said [*mortgagor*], his heirs, executors, administrators, or assigns, for his and their own use and benefit: And subject and without prejudice to the trusts aforesaid, *Upon trust* that the said [*trustee*], his heirs and assigns, shall and do stand seised of and interested in the said manors and other hereditaments expressed to be hereby granted and released, and the rents and profits thereof which shall accrue after the determination of the estate for life of the said [*tenant for life*] therein, or so much and such part and parts of the said manor and other hereditaments, rents, issues, and profits, as shall remain unsold and undisposed of for the purposes aforesaid, *In trust* for the said [*mortgagor*], his heirs and assigns; PROVIDED AL-

REVERSION IN FEE TO A TRUSTEE FOR SALE.

Application of purchase money.

Subject to previous trusts, trustee to hold in trust for mortgagee.

REVERSION IN FEE TO A TRUSTEE FOR SALE.

WAYS, and it is hereby agreed and declared between and by the said parties hereto, that, if the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall and do well and truly pay or cause to be paid unto the said [*mortgagee*], his executors, administrators, or assigns, at or in the common dining-hall of Lincoln's Inn, the sum of 5,000*l.* of lawful &c., on the —— day of —— now next ensuing, with interest for the same in the mean time after the rate of five pounds for every one hundred pounds by the year, without any deduction or abatement whatsoever, Then, at any time after such payment shall be made, he the said [*trustee*], his heirs or assigns, shall and will, at the request, costs, and charges of the said [*mortgagor*], his heirs or assigns, release and convey all and singular the said manor, messuages, lands, tenements, and hereditaments, hereinbefore expressed to be hereby granted and released, with their appurtenances, unto and to the use of the said [*mortgagor*], his heirs and assigns, or as he or they shall direct or appoint, (subject to the life estate therein of the said [*tenant for life*], if he shall be then living), but free from all incumbrances whatsoever made, done, executed, or committed by the said [*trustee*], his heirs or assigns, or any other person or persons lawfully claiming or to claim by, from, through, under, or in trust for him or them; PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said parties to these presents, that the receipt or receipts of the said [*trustee*], his heirs, executors, administrators, or assigns, for the purchase money of the said hereditaments so to be sold as aforesaid, or of the rents and profits thereof so to be received as aforesaid, shall be a good and effectual discharge to the person or persons paying the same; and that such person or persons taking such receipt or receipts as aforesaid shall not be afterwards bound or obliged to see to the application, or be in anywise answerable or accountable for the loss, misapplication, or nonapplication of the monies therein acknowledged to be received; nor shall any purchaser or purchasers of the said hereditaments, or any part thereof, or the person or persons paying the rents and profits thereof as aforesaid, be bound to inquire into the necessity or propriety of any such sale or sales, or of the receipt of the said rents and profits as aforesaid. *(Covenant with mortgagee to pay*

Proviso for redemption.

Trustee's receipts to discharge purchasers, &c.

mortgage money). And the said [*mortgagor*], for himself, his heirs, executors, and administrators, doth hereby covenant with the [*trustee*], his heirs, and assigns, and also with the [*mortgagee*], his executors, administrators, and assigns, in manner following, (that is to say), That [he the said [*mortgagor*] now, at the time of the sealing and delivery of these presents, is lawfully, rightfully, and absolutely entitled to the said manor and other hereditaments hereinbefore described and expressed to be hereby granted and released, and the inheritance thereof, in fee-simple in reversion, (subject only to the estate for life therein of the said [*tenant for life*]), without any manner of condition, contingent proviso, trust, power of revocation, or limitation of any new or other use or uses, or any restraint, cause, matter, or thing, to alter, change, charge, revoke, make void, lessen, incumber, or determine the same; *And that*(*c*)] he the said [*mortgagor*] now hath in himself good right, full power, and lawful and absolute authority to grant, bargain, sell, and release the said manor and other hereditaments hereinbefore described and expressed to be hereby granted and released, with their appurtenances, unto and to the use of the said [*trustee*], his heirs and assigns, subject as and in manner aforesaid, according to the true intent and meaning of these presents: *And further*, that it shall be lawful for the said [*trustee*], his heirs and assigns, from time to time and at all times after the decease of the said [*tenant for life*], peaceably and quietly to enter into and upon, and to have, hold, use, occupy, possess, and enjoy the said manor and other hereditaments, with their and every of their appurtenances, and to receive and take the rents and profits thereof, without any [lawful let, suit, trouble, denial, eviction, ejection,] interruption or disturbance whatsoever, of, from, or by the said [*mortgagor*], his heirs, executors, or administrators, or of, from, or by any person or persons whomsoever; *And that* free and clear, and freely, clearly, and absolutely acquitted, exonerated, and discharged, or otherwise, by the said [*mortgagor*], his heirs, executors, or administrators, [well and sufficiently saved, defended,

REVERSION IN FEE TO A TRUSTEE FOR SALE.

Covenants by mortgagor,

that he is seised in fee,

and has good right to convey.

For quiet enjoyment after the decease of tenant for life.

Free from incumbrances.

(*c*) For the sake of brevity, this covenant in a mortgage may be very properly omitted.

REVERSION IN FEE TO A TRUSTEE FOR SALE.

and] kept harmless and indemnified from and against all and all manner of [former and other gifts, grants, bargains, sales, mortgages, jointures, dower, right and title of dower, uses, trusts, wills, entails, statutes, recognizances, judgments, extents, executions, debts, legacies, annuities, sum and sums of money, rent and arrears of rent, and from and against all and singular other estates, titles, troubles], charges and incumbrances whatsoever, [had, made, done, committed, executed, or willingly or knowingly suffered by him the said [*mortgagor*], or by any other person or persons whomsoever]: *And further*, that he the said [*mortgagor*], and his heirs, and every other person having or lawfully claiming any estate, right, title, charge, or interest in, to, upon, or out of the manor and other hereditaments and premises expressed to be hereby granted and released, or any part thereof, shall and will, from time to time and at all times hereafter, upon every reasonable request of the said [*trustee*], his heirs or assigns, or of the said [*mortgagee*], his executors, administrators, or assigns, and until such sale or sales as aforesaid, at the expense of the said [*mortgagor*], his heirs, or assigns, but afterwards at the expense of the person or persons requiring the same, make, do, acknowledge, levy, suffer, and execute, or cause and procure to be made, done, acknowledged, levied, suffered, and executed all such further and other lawful and reasonable acts, deeds, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly, and absolutely granting, releasing, and assuring the said manor and other hereditaments and premises expressed to be hereby granted and released, with their appurtenances, subject to the life-interest therein of the said [*tenant for life*], if living, unto and to the use of the said [*trustee*], his heirs or assigns, or otherwise as he or they should direct or appoint, [be the same by fine, feoffment, common recovery, deed enrolled or not enrolled, or any other matter of record or not of record, or otherwise howsoever], as by the said [*trustee*], his heirs or assigns, or the said [*mortgagee*], his executors, administrators, or assigns, or his or their counsel in the law shall be reasonably advised or devised and required. IN WITNESS, &c.

And for further assurance.

FURTHER CHARGE (*a*) *on Premises comprised in the preceding Security, and* DECLARATION *that the* TRUSTS FOR SALE, *&c., therein, may be* EXERCISED *for* RAISING *Money* SECURED *by the* FOLLOWING DEED.

FURTHER CHARGE AFTER CONVEYANCE IN TRUST FOR SALE.

THIS INDENTURE, &c., BETWEEN [*mortgagor*], of &c., of the first part; [*mortgagee*], of &c., of the second

Parties.

(*a*) In preparing surcharges, it is, of course, material to consider, whether the mortgagee has not already a charge on the estate, for the additional debt proposed to be secured.

It is clear, by a long-settled rule, that where there are two distinct mortgages of several estates, by the same mortgagor to the same mortgagee, to secure *different* debts, the mortgagor cannot redeem one without redeeming the other. *Shuttleworth* v. *Laywick*, 1 Vern. 245; and see Ib. 29; *Pope* v. *Onslow*, 2 Vern. 286; *Mergrave* v. *Le Hooke*, Ib, 207; *Collett* v. *Mundon*, cit. 2 Ves. jun. 377; *Roe* d. *Kaye* v. *Soley*, 2 Black. 726; *Willie* v. *Lugg*, 2 Ed. C. C. 78*. And the rule, it seems, applies (though the contrary has sometimes been laid down, *Willie* v. *Lugg*, 2 Ed. C. C. 78) to the purchaser or incumbrancer of an equity of redemption, even though he had no notice of the mortgage affecting the estate not comprised in his purchase or security.

When there are several mortgages, mortgagor cannot redeem one without the other.

Rule extends to purchasers.

Thus, if A. mortgages Whiteacre for 1000*l.* to B., and afterwards mortgages Blackacre for 500*l.* to B., and then mortgages or sells the equity of redemption in Blackacre to C., without apprising him of the existence of the other mortgage to B., C. could not redeem Blackacre, except upon the same terms as A. could have done, namely, by paying both mortgages; *Fribourg* v. Lord *Pomfret*, cit. Amb. 733; *Ex parte Carter*, Amb. 733; *Ireson* v. *Denn*, 2 Cox, 425; and the rule is the same where one mortgage is of real and the other of personal estate. *Jones* v. *Smith*, 2 Ves. jun. 376; 6 Ves. 229, n.

This is a very important doctrine to purchasers and mortgagees; for it

* But this case is not very intelligible. It does not appear by the statement of it, that *East Dale*, the estate sought to be redeemed, was in mortgage at all.

FURTHER CHARGE AFTER CONVEYANCE IN TRUST FOR SALE.

part; and [*trustee*], of &c., of the third part. WHEREAS by indentures of lease and release, bearing date, &c.

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shews, that no person can safely buy, or advance money on an equity of redemption, without ascertaining *from the mortgagee*, that he has no other mortgage from the proposed vendor or mortgagor.

Remarks upon the doctrine.

Some points, in regard to this doctrine, are in much uncertainty. It is not clear, whether it applies to mortgages originally made to different persons which have become united in the same person. The converse case occurred in *Roe* d. *Kaye* v. *Soley*, 2 Black. 726, where A., having mortgaged an estate to B., afterwards purchased the equity of redemption in another estate, also in mortgage to B., and he having applied to redeem the purchased estate, under the statute 7 Geo. 2, c. 20, the Court would not allow him to do so, without paying off the other mortgage created by himself.

The principle upon which this doctrine stands, is not very satisfactory. Where two estates are included in the same mortgage, it is clear, that neither the mortgagor himself, nor any person claiming by purchase or otherwise from him, ought to be permitted to redeem one estate without paying the debt upon the whole, for the obvious reason, that every part of the land is charged with the whole debt; but where there are two distinct mortgages between the same parties, it is difficult to discover any solid ground for treating them as standing upon a different footing than where they are made to different persons; and the reason usually assigned, that a party requiring equity (that is, calling for redemption) must do equity, does not conclusively shew why the Court should consolidate two contracts, which the parties, who might easily have done otherwise, have treated as distinct.

Of course, the rule can only be applied where both mortgages have become redeemable; thus, if A. execute a mortgage of Blackacre to B. redeemable on the 1st of January, 1827, and afterwards make a mortgage of Whiteacre to B. for another debt, redeemable on the 1st of January, 1828, A. may, in the interval between these two periods, redeem Blackacre without redeeming Whiteacre, the time for the redemption of the latter not having arrived*.

And it is to be observed, that the doctrine in question is only applicable where the mortgagor seeks to redeem, and not in the case of a suit of foreclosure instituted against him by the mortgagee. If, therefore, in the case last suggested, the mortgagee were to take proceedings for the foreclosure of the equity of redemption of both mortgages, they having become abso-

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* Lord *Alvanley*, in *Jones* v. *Smith*, 2 Ves. jun. 377, expressly puts the case of two mortgages which have become absolute at law.

(Recite the last deed fully, except the common covenants). AND WHEREAS the said [*mortgagee*], at the request of the

FURTHER CHARGE AFTER CONVEYANCE IN TRUST FOR SALE.

lute, it would be in the power of the mortgagor to redeem the one and allow himself to be foreclosed as to the other.

Agreement for further advance,

It is clear also, that the rule does not apply, except where the mortgagors and mortgagees are the only persons interested, and third persons are not liable to be prejudiced; and therefore, if A. and B. mortgage an estate to C., and A. alone mortgage an estate for a different debt, A. and B. may redeem their mortgage, without being compelled to redeem also the separate mortgage of A. In a case which lately occurred in practice, A. mortgaged Blackacre, and B., by the same deed, Whiteacre, to secure a debt to C.; B. alone mortgaged Greenacre for another debt to C., and afterwards purchased Blackacre of A.; and the question was, whether he could redeem Blackacre and Whiteacre, (as he and A., before the purchase, might clearly have done), without also redeeming Greenacre, which was comprised in his separate mortgage; and the Editor thought it was not clear that he could. Perhaps the circumstance of A. and B. being mortgagors by the same instrument, though of different estates, somewhat strengthened the case here. Of course, where a mortgagee, who holds several mortgages from the same person, assigns one of them, he loses the benefit of the rule in question; for, as the parties against whom the redemption is to be claimed, are different in the two cases, and this by the act of the mortgagee himself, it becomes analogous to the case of mortgages to different persons.

It is clear, that where a person lends his mortgage-debtor a further sum, without any agreement that the security shall extend to the further advance, he is not entitled to hold the mortgage as a security for the monies thus advanced; and a parol agreement is, for this purpose, inoperative; for, though equitable mortgages may be created by a mere deposit of title-deeds without writing,—a doctrine which will be discussed in a future note,—yet the principle does not extend to a case in which the deeds are already in the possession of the creditor, as a mortgagee of the legal estate, and not as a depositary merely; and the formal re-delivery of the deeds would clearly make no difference in such a case. *Ex parte Hooper*, 19 Ves. 477; *S.C.* 2 Rose, 328; 1 Mer. 7.

Mortgagees cannot tack bond debts against the mortgagor himself.

The question, however, has been much discussed, whether a mortgagee has a right to tack a *bond* debt to his security.

The affirmative appears to have been held in some early cases; *Hallilay* v. *Kitland*, 2 Ch. Rep. 361; *Baxter* v. *Manning*, 1 Vern. 244; *Anon.* 3 Salk. 84; but it is now clearly established, that, as against the mortgagor himself, the mortgagee cannot tack a bond debt. *Lowthian* v. *Hassel*, 3 B. C. C. 162; see also *Challis* v. *Casbourn*, Pre. Ch. 407; *Anon.* 2 Ves.

FURTHER CHARGE AFTER CONVEYANCE IN TRUST FOR SALE.

said [*mortgagor*], hath agreed to advance to him the said [*mortgagor*] the further sum of two thousand pounds, at

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sen. 661; 12 Mod. 559. And the same rule of course extends to purchasers of the equity of redemption.

Thus, in *Archer* v. *Snapp*, 2 Stra. 1107; *S. C.* Andrews, 341, it was held, that a purchaser of an equity of redemption was entitled to stay proceedings under stat. 7 Geo. 2, in an action of ejectment brought by the mortgagee, on paying the mortgage money, without also paying a bond debt due from the mortgagor to the mortgagee, of which he, at the time of the purchase, had notice. (See also *Bailey* v. *Robson*, Pre. Ch. 89; *Troughton* v. *Troughton*, 3 Atk. 659). And, *a fortiori*, it is clear, that a mortgagee cannot tack a bond debt against creditors. *Hamerton* v. *Rogers*, 1 Ves. jun. 513.

Contra, against the heir.

But where a mortgagor dies, owing his mortgagee, in addition to the mortgage, a bond or other specialty debt in which the heir, being named, is bound, he (the heir) is not permitted to redeem, without paying the specialty debt; *Shuttleworth* v. *Laywick*, 1 Vern. 245; *Price* v. *Fastnedge*, Amb. 685; because, as the equity of redemption is assets in the hands of the heir, for the payment of the mortgage debt, (assuming it to be secured by bond or covenant), the Court, to avoid circuity of action, will allow him to retain it. And it is immaterial that the bond preceded the mortgage. *Windham* v. *Jennings*, 2 Ch. Rep. 247.

And the same doctrine clearly applies to a devisee, provided the debt be of such a nature as to bind him. (As to which, *vide* Pow. on Dev. 3rd ed. 459); *Challis* v. *Casborn*, Pre. Ch. 407; *Heams* v. *Bance*, 3 Atk. 630; and it has also been considered to apply to volunteers generally. *Troughton* v. *Troughton*, 3 Atk. 659.

But not to the prejudice of creditors.

But it is important to observe, that this right of tacking, as against the heir or devisee of the mortgagor, is not allowed, as in justice it ought not, to operate to the prejudice of the creditors of the mortgagor; and, therefore, if A. dies, owing to B. 500*l.* on mortgage, and also 500*l.* on bond, and having other bond creditors, whom his estate is insufficient to satisfy, B. cannot tack his bond debt to the mortgage, as against the creditors of A., as he might have done against the heir or devisee, but must come in *pari passu* with them. *Lowthian* v. *Hassel*, 3 B. C. C. 162. By parity of reasoning, if there is a charge of debts upon the real estate, under which the equity of redemption in the mortgaged lands, being equitable assets, would be distributable among all the creditors without distinction, the mortgagee, in respect of his debt not secured by the mortgage, must come in rateably with the creditors at large. *Heams* v. *Bance*, 3 Atk. 630; *Price* v. *Fastnedge*, Amb. 685. Of course, the mortgagee can only tack, against the representative of the mortgagor, debts by which such representative is

FURTHER CHARGE AFTER CONVEYANCE IN TRUST FOR SALE.

interest, upon security of the said manor and other hereditaments hereinbefore mentioned; and the said [*mortgagee*] hath this day paid unto the said [*mortgagor*] the sum of two thousand pounds sterling, the receipt whereof he doth hereby acknowledge. NOW THIS INDENTURE WITNESSETH, that in consideration of the sum of two thousand pounds, so lent by the said [*mortgagee*] to the said [*mortgagor*] as aforesaid, he the said [*mortgagor*] doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said [*mortgagee*], his executors, administrators, and assigns, that he the said [*mortgagor*], his heirs, executors, or administrators, shall and will well and truly pay, or cause to be paid, unto the said [*mortgagee*], his executors, administrators, or assigns, the sum of two thousand pounds of lawful money, &c., on the —— day of —— next ensuing (*b*), with interest for the same in the mean time, after the rate of five pounds *per centum per annum*, free from taxes and without any other deduction whatsoever; And for the more effectually securing the payment of the said sum of two thousand pounds and interest to the said [*mortgagee*], his executors, administrators, and assigns, he the said [*mortgagor*] doth hereby, for himself, his heirs, executors, and administrators, covenant,

and payment of the money.

Testatum.

Mortgagor covenants to pay the money;

And that lands shall be charged.

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bound. Thus, he would have no such right against an heir or devisee, in respect of a simple contract debt; *Newby* v. *Cooper*, Finch, 379; unless, it should seem, the mortgagor were a trader, so that his real estate was bound by his simple contract debts. (See stat. 47 Geo. 3, c. 74). For the same reason, if the mortgage were of leaseholds or other personal estate, the mortgagee would (subject to the claims of creditors) be entitled to tack even simple contract debts, against the executor or administrator. *Eccles* v. *Thawill*, Pre. Ch. 18; *Demandry* v. *Metcalf*, Ib. 419; *S. C.* 2 Vern. 691.

(*b*) This may be the same day as the one fixed for payment of the money secured by the original mortgage. If a *subsequent* day be named, it would be proper to add a declaration, that nothing in this deed should be construed to postpone or interfere with the trusts for sale in the mortgage deed, to prevent its being contended, that the trust was not exerciseable until default had been made in payment of the monies secured by the *present* deed, as well as that of the original mortgage.

FURTHER CHARGE AFTER CONVEYANCE IN TRUST FOR SALE.

grant, and agree, to and with the said [*mortgagee*], his executors, administrators, and assigns, that all and singular the said manor, messuages, &c., comprised in the said recited indentures of lease and release, and thereby granted and conveyed to the said [*trustee*], his heirs and assigns, upon the trusts aforesaid, together with their appurtenances, shall henceforth stand and be charged and chargeable with, and remain, continue, and be a security to the said [*mortgagee*], his executors, administrators, and assigns, for payment of the said sum of two thousand pounds, and interest for the same, after the rate aforesaid, at or upon the day or time hereinbefore mentioned for payment thereof, and that the same manor and other hereditaments, or any part thereof, shall not be redeemed or redeemable, until the said principal sum of two thousand pounds, and the interest thereof, shall be fully paid and satisfied unto the said [*mortgagee*], his executors, administrators, or assigns; *And it is hereby agreed and declared* between and by the said [*mortgagor*] and [*mortgagee*], that the trusts, powers, and provisoes, declared and contained in and by the said recited indenture of release, for the levying, raising, and paying the aforesaid sum of five thousand pounds and interest, shall be applicable to the raising and paying as well the said sum of two thousand pounds hereby secured, and the interest thereof, in case default shall be made in payment thereof, or of any part thereof, as the aforesaid principal sum of five thousand pounds and interest; and that the said [*trustee*], his heirs and assigns, shall henceforth accordingly stand seised of the aforesaid manor and other hereditaments, with the appurtenances, upon such trusts, and under such powers and provisoes as shall be necessary for effecting the purpose aforesaid (*c*). IN WITNESS, &c.

Declaration that trusts of recited deed shall extend to the sum hereby secured.

(*c*) Deeds of further charge are frequently made by indorsement on the original deed. It is then unnecessary, of course, to recite such deed, but the indorsed indenture is made between the "within-named A. B., &c. and simply recites the agreement for a further advance, and the agreement to charge the hereditaments comprised in the "within-written indenture." With this slight variation of phraseology throughout, the present form is equally adapted to such a case.

MORTGAGE *by Two* TENANTS *in common, for* LIFE, *by Demise for* NINETY-NINE YEARS, *determinable with their respective Lives, for securing the Payment of One Hundred and Seventy Pounds and Interest, by* INSTALMENTS. *(Variation, where the Mortgage is of the* WHOLE ESTATE *for* LIFE; *also, where an* INSURANCE *is effected on the* LIFE *of one of the* MORTGAGORS, *as a collateral Security). (A very concise Form.)*

BY TENANTS FOR LIFE, WITH LIFE INSURANCE.

THIS INDENTURE, made the —— day of ——, in the year of the Christian æra ——, BETWEEN [*mortgagors*], of &c., of the one part; and [*mortgagee*], of &c., of the other part; WITNESSETH, that, in consideration of *Testatum.* the sum of 170*l.* of lawful money of Great Britain and Ireland, to the said [*mortgagors*] in hand paid by the said [*mortgagee*] at or before the sealing and delivery of these presents, the receipt whereof they the said [*mortgagors*] do hereby severally acknowledge, and thereof and therefrom do hereby severally discharge the said [*mortgagee*], his executors, administrators, and assigns, they the said [*mortgagors*] *Have*, and each of them *Hath* granted, bargained, sold, and demised (*a*), and by these presents *Do*, and each of them *Doth* grant, bargain, sell,

(*a*) The advantage of making the mortgage by way of demise, as in the text, is, that it requires a single deed only, the necessity of a lease for a year being avoided. If the conveyance is to include the *whole* estates for life of the mortgagors, the variations will be as follow:—

" *Have*, and each of them *Hath* granted, bargained, sold, and released, and by these presents *Do*, &c. grant, bargain, sell, and release, unto the said [*mortgagee*], his executors, administrators, and assigns, (in the actual possession, &c. *ut ante*, p. 258).

Variation, where mortgage is of the whole estate.

BY TENANTS FOR LIFE, WITH LIFE INSURANCE.

and demise, unto the said [*mortgagee*], his executors, administrators, and assigns, *All that* messuage late of [*testator*], late of ——, farmer, deceased, and now or late in his occupation, situate in —— aforesaid, which said messuage was, by the will of the said [*testator*], dated the —— day of ——, devised to [*A. B.*], the father of the said [*mortgagors*], during his life, and, after his decease, unto the said [*mortgagors*], equally, during their respective lives, and with remainder to their respective children, in manner in the said will mentioned, which estate and interest of the father of the said [*mortgagors*] in the said messuage, under the said will, determined by his decease, on the —— day of —— last; *And* all outhouses, and other buildings, yards, passages, ways, easements, and appurtenances whatsoever, to the said messuage belonging; *And* the reversion and reversions, remainder and remainders thereof (*b*); *And also* all deeds and muniments of title relating to the said premises, now in the custody of the said [*mortgagors*], or either of them, or which they or he can procure, without suit (*c*): TO HAVE AND TO HOLD the said heredita-

General words.

Habendum.

(*b*) "And all the estate, right, title, interest, property, claim, and demand whatsoever, of them the said [*mortgagors*] respectively, of, in, and to the said messuage and premises."

Mortgage by demise should contain a grant of deeds.

(*c*) A grant of title deeds should never be omitted in a mortgage, particularly where the mortgage is for a term only, by an owner in fee; for a termor, however long his term may be, is not entitled, in respect of his interest, to the deeds, which properly go with the freehold; *Harper* v. *Faulder*, 4 Madd. 129. And in the case of a foreclosure-suit by such a mortgagee, the Court will not order the deeds remaining in the possession of the mortgagor to be delivered to him, unless there be an express contract in the deed entitling him to them. *Wiseman* v. *Westland*, 1 Younge & Jerv. 117. And in *any* case, it should seem, that where a mortgagee, in a suit to foreclose the equity of redemption, seeks to obtain the deeds, this should be specially prayed. *Ibid.*

Importance of mortgagee obtaining possession of deeds.

But no prudent mortgagee will be satisfied with a grant only of the deeds; he will take care that they are placed in his possession, unless a satisfactory reason is given for their non-production; as that the mortgagor has a partial interest only in the estate, and the deeds are in the hands of the other owners, or the like. Except in these cases, the absence of the

ments and premises, with their appurtenances, unto the said [*mortgagee*], his executors, administrators, and as-

BY TENANTS FOR LIFE, WITH LIFE INSURANCE.

deeds affords ground for a suspicion that the property has been previously incumbered. The custody of the deeds, however, does not completely place a mortgagee beyond the reach of danger of this kind; for, by the doctrine now established, the possession of the deeds would not give him precedence over a prior mortgagee, who had neglected to take, or had parted with them, unless his negligence were so gross as to amount to evidence of fraud; and, therefore, if the deeds have been withheld, or obtained from a mortgagee, on any colourable pretence, by the mortgagor, he will not, on this account, be postponed to a subsequent incumbrancer, to whom they were delivered. The contrary, indeed, was laid down by Mr. Justice *Burnet*, in the case of *Ryall* v. *Rowles*, 1 Ves. sen. 360, who said, that "in equity, where deeds are left with a second mortgagee, and the first mortgagee neglects to take them into his possession, the first mortgagee is postponed;" and also by Mr. Justice *Buller*, in *Goodtitle* v. *Morgan*, 1 D. & E. 735, where that learned Judge declared it to be "an established rule in a Court of Equity, that a second mortgagee, who has the title deeds, without notice of any prior incumbrance shall be preferred; because, if a mortgagee lends money upon mortgage, without taking the title deeds, he enables the mortgagor to commit a fraud." It is impossible to deny the force of this remark, and it has often been a subject of regret that such a rule was not established. That no such rule exists, however, will appear on the most cursory examination of the authorities.

Mortgagee not postponed for parting with deeds, unless in cases of gross negligence.

One of the earliest cases on the subject is *Peter* v. *Russell*, 1 Eq. Ca. Abr. 321, pl. 7; Gilb. Eq. Rep. 122; 2 Vern. 726, *S. C.*, where R., being assignee of the mortgage of a leasehold estate belonging to G., and having the lease in his custody, G. afterwards proposed to borrow a further sum of P. on a mortgage of part of the same estate; and the attorney for P. desiring to see the original lease, G. told him, that he had it not by him, but that his lawyer kept all his writings for him, as not thinking it safe to trust them in his own house. Then G. applied to R. telling him that he was about agreeing with a person for rebuilding part of the premises, which would better his security, and desired him to let him have the original lease, that he might see the dimensions of the house. R. would not trust G. with the lease in his own power, but went with him to the house, and, after he had been there some time, G. sent for P. and his attorney, telling them, he had now the original lease, which they might see; and upon their coming to his house, G. went into the room where R. was, and desired him to let him have the lease to shew the person he had mentioned, for that he was now in the house. Accordingly, R. let him have the lease, which he carried to P., who, being satisfied therewith, lent

A mortgagee who had for a short time parted with the custody of a lease not postponed.

BY TENANTS FOR LIFE, WITH LIFE INSURANCE.

signs, from the day next before the day of the date of these presents, for and during the term of (*d*) ninety-nine

(*d*) "during the term of the respective natural lives of the said [*mortgagors*], and for all other their estate and interest in the said premises."

him the money, and took a mortgage of part of the premises, insisting at the same time to have the original lease delivered to him. But G. urging that it concerned much more than what P. had in mortgage, and that he could not part with it, P. permitted him to keep it, and he thereupon, in an hour's time, delivered it again to R. without acquainting him with what he had done; and R. swore expressly in his answer, that he had no notice of this transaction. Afterwards, P. lent G. a further sum of money, and he prevailed on R. to let him have the lease a second time, but R. did not know the occasion for it. R. having recovered in ejectment, a bill was filed by P. to have R.'s mortgage postponed, upon the ground that it was a manifest fraud in G., and that R. was privy to it. But the Lord Chancellor observed, that there was no proof that R. knew any thing of P. lending this money; and if there had, yet P. appeared guilty of so much a grosser neglect, that he ought not to prevail; for R. entrusted G. with his original lease but for a very little while; but P. took his word, that he could not part with it, and left it wholly in his power to go on defrauding whom else he had a mind to: besides, it appeared, that R. was imposed upon by G., for he parted with the lease only to better his own security, and had the most specious pretence that could be for it; and therefore, it could not, without manifest proof, be objected to him, that he let G. have his lease to shew P., or with a design to draw in P. to lend his money. His Lordship therefore dismissed the bill.

Mortgagee of a reversion not postponed for accepting a mortgage without the deeds.

So, in the case of *Tourle* v. *Rand*, 2 B. C. C. 650, where it appeared, that R. being, as supposed, entitled to a remainder in fee (but in fact only to a remainder in tail), expectant on the death of his mother, in certain freehold estates, conveyed his remainder to the defendant I. in fee, by way of mortgage, for securing 450*l.* with interest. At the time of making the mortgage, the deeds were in the hands of the executor of the grandmother of R., but I.'s attorney was informed by the mortgagor, that they were in the possession of the mother, who would not consent to part with them, she being then in possession of the estate as tenant for life. Immediately after her decease, I.'s attorney applied to R. for the possession of the title deeds, to which R.'s general answer was, that he would send them in a day or two, or to that effect. Shortly afterwards, R. mortgaged this estate (with another) to the plaintiff T., and at the same time *delivered*

years, thence next ensuing, or for so much of the said term as the estate or interest of the said [*mortgagors*]

BY TENANTS FOR LIFE, WITH LIFE INSURANCE.

to T.'s attorney all the title deeds. T. now filed his bill to foreclose the mortgaged premises, and praying, that I. might be compelled to redeem T.'s mortgage, on the ground, that where a prior mortgagee leaves the title deeds in the possession of the mortgagor, it is a fraud upon the second mortgagee, as he is induced, by the title appearing on the deeds, to lend his money: that the second mortgagee, therefore, having the deeds, should be preferred. But Lord *Thurlow* said, that he did not conceive that a first mortgagee not taking the deeds, was alone sufficient to postpone him. If it were so, there could be no such thing as a mortgage of a reversion. In that case, the deeds being in the hands of the tenant for life is not sufficient to turn him round. The first cases, where the prior mortgagee was postponed, were cases of fraud; then the same was done in cases of gross negligence. Here was no laches; the mortgagee could not compel the tenant for life to give up the deeds, though a dowress, upon a confirmation of her title, might be compelled. Although, after her decease, he might have filed a bill, that was not sufficient to charge him.

In another case, which came before Lord *Thurlow*, where it appeared that the first mortgagee had required all the title deeds, and was assured by the mortgagor that they were delivered to him, his Lordship held, that there must be a voluntary lending of the deeds, to enable the second mortgagee to gain the priority. *Pinner* v. *Jemmett*, 1 Fonbl. Treat. Eq. 165, n.

Trustee delivering deeds to tenant for life.

The doctrine in question underwent much discussion in the case of *Evans* v. *Bicknell*, 6 Ves. 174, which was a suit by the mortgagee against the trustee of a marriage settlement, for having delivered the title deeds of the settled estates to the tenant for life, with the fraudulent design of enabling him to mortgage the estate, by representing himself to be owner of the inheritance, which he did, to the plaintiff; but Lord *Eldon*, thinking the charge of fraud (which was denied by the answer,) not sufficiently made out by the evidence, and that the case, therefore, was nothing more than the delivery by a trustee of the title deeds to a party who had already a counterpart of the settlement, (for such was the fact), dismissed the bill.

Lord *Eldon's* statement of the general rule.

In this case, Lord *Eldon* declared the doctrine to be, "that the mere circumstance of parting with the title deeds, unless there is fraud, concealment, or some such purpose, or some concurrence in such purpose, or that gross negligence that amounts to evidence of a fraudulent intention, is not of itself a sufficient ground to postpone the first mortgagee. I agree," his Lordship added, "with Chief Justice *Eyre**, I should have been glad to have found the rule established in the Court the other way;

* See *Plumb* v. *Fluitt*, *post*, p. 414.

BY TENANTS FOR LIFE, WITH LIFE INSURANCE.

respectively, or either of them, in the said hereditaments and premises respectively, shall endure. *Provided* that

Proviso for redemption.

at the same time allowance must be made for the cases put by Mr. *Fonblanque*, of joint tenants and tenants in common, cases of necessary exception. All cannot have the deeds. Therefore, if the rule could be pressed to the extent to which Mr. Justice *Buller* carried it, those cases must be excepted, in which, from the nature of the title, the deeds may be honestly out of the possession; with that exception, such a rule would avoid a great deal of fraud in mortgage titles; upon which this observation arises, *that no man can tell when he is perfectly secure. But there is not such a rule.*"

In the case of *Barnett* v. *Weston*, 12 Ves. 130, it was considered by Sir *William Grant* to be so clear, that a mortgagee, who, without fraud, lent the deeds to the mortgagor, was not to be postponed to a person to whom the mortgagor again mortgaged the property, and produced the title deeds, that the point was given up at the bar.

Martinez v. *Cooper.*

The last case belonging to the class under consideration, is *Martinez* v. *Cooper*, Russ. 198, where the mortgagee of a leasehold house gave up the indenture of lease to his mortgagor, in order that it might be shewn to an intended purchaser, who wished to see what the covenants in it were. The mortgagor produced the lease to him, and within a week afterwards left it in his possession, without disclosing the fact of there being an incumbrance on the property; the purchaser paid his purchase money, took an assignment from the mortgagor, and obtained possession of the house, without any notice of the existence of the mortgage; but the solicitor of the mortgagee deposed, that in an interview which he had had, before the completion of the purchase, with the solicitor of the purchaser, he had informed the latter, that a client of his was to receive a considerable sum out of the purchase money, and had requested to have notice of the time when the money was to be paid; and though the solicitor of the purchaser denied that any such interview had taken place before the completion of the purchase, a jury gave a verdict in favour of the statement made on that point by the solicitor of the mortgagee. Lord *Eldon* held, that, under these circumstances, the mortgagee was not to be postponed to the purchaser, his Lordship observing, that "there must be either direct fraud, or negligence amounting to evidence of fraud, to induce this Court to interfere for the purpose of postponing a party, who insists on the legal benefit of the deed."

Cases in which the non-delivery of the deeds is accounted for.

Where the mortgage is made under circumstances which account for and justify the non-delivery of the deeds, the ground for impugning the conduct of the mortgagee in not requiring the possession of them is of course proportionably weakened. These circumstances may arise from the nature of the mortgagor's interest being an estate for life, (as in

if the said [*mortgagors*], or either of them, their, or either of their executors, administrators, or assigns, shall pay

BY TENANTS FOR LIFE, WITH LIFE INSURANCE.

the text), or a reversion only, (as in *Tourle* v. *Rand*, *sup.* p. 409), or an aliquot share in the property, or from the mortgage being made by persons in a fiduciary character, who have other trusts to perform, requiring that they should retain the deeds. Such were the circumstances of the late case of *Harper* v. *Faulder*, 4 Madd. 129; where lands being vested in trustees in trust for raising by sale or mortgage a sum of 35,000*l.*, and indemnifying the lenders against certain rent-charge and portions; they, in consideration of 5,000*l.*, granted an annuity to F. the defendant, determinable on the death of the survivor of three persons, which was secured by a term of years and a judgment not docketed; the annuitant permitted the deeds to remain in the hands of the trustees, who afterwards made a mortgage to H. the plaintiff, for raising other parts of the 35,000*l.*, without informing him of the prior incumbrance; H. now claimed priority over F., on the ground that the latter had, by foregoing the possession of the deeds, enabled the trustees to commit a fraud on him; and that the deeds ought at least to have been deposited with a third person, or the annuitant should have had a notice of his security indorsed on the trust deed: Sir *J. Leach*, V. C., dismissed the bill. His Honor refused to admit, that there was any such doctrine as that an incumbrancer was to be postponed for simply leaving the title deeds in the hands of the mortgagor; and was of opinion that, at all events, it did not apply to the present case, in which the possession of the title deeds was not legally incident to his estate; nor was the defendant required, upon the principle of reasonable diligence, to have stipulated for the possession of them; but it would have been a breach of trust, on the part of the trustees, to have given to one incumbrancer those instruments which they were bound to keep for the common security of all the persons advancing money upon the credit of their trust.

But though equity will not, we have seen, postpone a mortgagee to a second incumbrancer, on the ground merely of his parting with the deeds under the circumstances of the preceding cases, yet it will not assist him in recovering them; but allows the person who has thus gained possession of the deeds to retain such possession*. In the case of *Head* v. *Egerton*, 3 P. Wms. 280, S. made a mortgage of lands to H., who, placing a great confidence in him, lent the money, upon his promise to deliver to him the title deeds; the mortgage being executed in *London*, and he pretending the title deeds were in the country. Afterwards,

But equity will not restore the deeds to the person who has parted with them.

* But could not the first mortgagee, as the owner of the legal estate, maintain an action of trover for the deeds, and would equity restrain him from bringing such action?

BY TENANTS FOR LIFE, WITH LIFE INSURANCE.

unto the said [*mortgagee*], his executors, administrators, or assigns, the principal sum of 170*l.* of lawful British

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S. borrowed 2,000*l.* of E. on a mortgage of the same lands, and delivered to him the deeds in question; H. then filed a bill to foreclose E., and to compel him to deliver up the title deeds; E. pleaded the mortgage made to him, denied notice of the prior mortgage to H., and insisted, that the Court ought not to assist H. and take the title deeds from him, without ordering him to be paid his mortgage money; and the Lord Chancellor decreed accordingly. So, in *Ex parte Meux*, 1 Glyn. & Jam. 116, where M. & Co. being in possession of the title deeds of certain leasehold tenements belonging to A. as the security for a debt due from him, at his request delivered the original lease and the immediate assignment to A. to the solicitor of the lessor, for the purpose of enabling A. to obtain an extension of the term, and with an express injunction not to deliver them to A.; the solicitor, however, inadvertently gave them up to A., who subsequently deposited them with C. & D., to secure a sum of money lent by them to him, and became bankrupt. Sir *J. Leach*, V. C., was of opinion, that, as the retainer of the deeds by the bankrupt was a fraud upon M. & Co., they were to be considered as equitably in possession of *all* the deeds, and that C. & D. claiming only in equity, had no better title than the bankrupt could give them, and were therefore to be postponed to M. & Co. The case was brought before Lord *Eldon* by appeal, and his Lordship concurred in the opinion, that M. & Co. would not lose their priority, unless by fraud or gross negligence; and that there was nothing in the case to indicate a waiver of their lien; but his Lordship expressed great doubts whether M. & Co. having innocently, without fraud or gross neglect, lost the actual possession of some of the deeds, and another person equally innocent having obtained possession of them, the Court could take the possession from the latter. His Lordship was not called upon to decide the point, as the parties took an order by consent, in which the right of C. & D. to retain the deeds was admitted. So, in the late case of *Wiseman* v. *Westland*, 1 Younge & Jerv. 117, where it appeared, that by deeds of lease and release, dated the 24th and 25th of March, 1819, two third parts in an estate were conveyed to B. as purchaser. On the same 25th of March, B. demised them to W. for 1000 years, to secure 200*l.* and interest, but the lease and release were not delivered to him. B. subsequently deposited these deeds with D. as a security for a sum of money. W. now filed a bill for the foreclosure of the mortgage, and claimed to have the lease and release of the 24th and 25th of March, 1819, delivered up to him by D.; but Lord Chief Baron *Alexander* considered it to be a sufficient objection to this claim, that D. was a mortgagee without notice, and therefore not bound to give up the deeds in question.

Remarks upon the cases.

The situation in which the doctrine of the preceding cases places the

money, and interest for the same at the rate of *5l. per centum per annum*, in manner following, that is to say,

BY TENANTS FOR LIFE, WITH LIFE INSURANCE.

parties is, that one having the estate, and the other the deeds, each has an unimpeachable right as against the other, to retain what he thus possessed. The former, however, has obviously an advantage over the latter, for the estate without the deeds is susceptible of enjoyment, though not equally marketable for sale; while the deeds, without the estate, are altogether useless, unless the owner of the estate, to whom alone they are of any value, can be induced to give a sum of money for them.

Difference suggested, where a mortgagee having the deeds, delivers them up, and where he orignally neglects to obtain them.

It is observable, that, in all the cases in which the delivery up of the deeds by a mortgagee has been held not to postpone him, some plausible ground has been alleged for requiring them out of his hands; but, where a person takes a security, *ab origine*, without the deeds, it should seem that it is not incumbent on *him* to prove that any reason was assigned for their non-production; so that, if the case simply be, that the mortgagor deposits the deeds with A., and afterwards makes a mortgage to B. without notice, A. has no equity against B. to have the benefit of the legal estate, which the latter has acquired. Thus, in the case of *Plumb* v. *Fluitt*, 2 Anst. 432, where one Basnett, being indebted to the plaintiff P. in the sum of 12,000*l.*, deposited with him the title deeds of an estate, as a security for that sum; and afterwards, being indebted to the defendant F. in 530*l.*, and being pressed by him for payment or security, executed to him a mortgage of the same estate (with other property). P. filed a bill against F., to restrain him from proceeding at law by virtue of his mortgage, and, upon the testimony of the mortgagor, charged him with notice of the deposit; but this was denied, and (the mortgagor's evidence upon the point being discredited) was considered as not proved. It was contended, that, even if there was no actual notice, yet that the circumstance of the deeds not being forthcoming amounted to *constructive* notice of a prior mortgage; this was denied by *Eyre*, C. B.: "Is it possible," said the learned Judge, "that this circumstance can, of itself, be notice of the hands into which they (the deeds) are fallen, or the purpose to which they have been applied? At the utmost, it can only be a circumstance of evidence, to shew, that there was reason for further inquiry, but, being unsupported by any other circumstance, it proves nothing. It is said, that no man will advance money upon any estate without seeing the title deeds, unless with a fraudulent intention. I wish I saw, in a Court of equity, some solid distinction established between a consideration which is an old debt, and a sum advanced *de novo*. There certainly is a great difference. In the one case, the creditor jumps at any security he can get; he takes the deed of conveyance now, and trusts to getting the title deeds afterwards; but till such a distinction is established,

Plumb v. *Fluitt.*

BY TENANTS FOR LIFE, WITH LIFE INSURANCE.

25*l.*, part of the said principal sum, and interest for the whole thereof, at the rate aforesaid, at the end of one

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it is difficult to apply the reasoning which would belong to it. The person who takes the legal estate without the deeds, in a case like this, appears to me, unless there be fraud, to be less blameable than he who takes the deeds without the estate." The learned Chief Baron, then, after expressing his opinion that the rule should be, "that, if a man takes, as his security for his mortgage, a single deed, and leaves the other deeds in the hands of the mortgagor, so as to enable him to commit a fraud, that he should, in all such cases, be postponed," declared that, according to the established doctrine, nothing but fraud, or gross and voluntary negligence in leaving the title deeds, will oust the priority of the legal claimant; and that he found no case that went the length of saying, that a failure of the utmost circumspection shall have the same effect of postponing a mortgagee, as if he were guilty of fraud or wilful neglect. "In the present case," he observed, "all the negligence, or all the activity in the world, would have left the defendant in exactly the same situation in which he now is. He took this mortgage as the only security he could get. If it was already mortgaged, he was only where he was before; he seizes it as a plank to save something, for as a second mortgage it was worth nothing. The plaintiff having therefore failed in making out his case of fraud, either by actual or constructive notice, and the general proposition not being supported, which, if established, must apply to purchases as well as mortgages, the bill must be dismissed with costs."

Inexpediency of taking a deposit security without the legal estate.

A remark has been already made on the inexpediency of a mortgagee accepting a security without having the deeds. The last decision demonstrates the danger of the converse case, namely, of relying upon a deposit of title deeds only, without taking a conveyance of the legal estate: for, after making an equitable mortgage by a deposit of deeds, whether accompanied by a writing or not, the mortgagor may at any time defeat it by conveying the property to a third person without notice, as a security for money advanced, or even for a pre-existing debt. It is lamentable to observe in this and other cases how often parties are plunged into expensive and protracted litigation, by resorting to expedients for saving a comparatively trifling expense in the first instance.

Knowledge that the deeds are in the hands of third persons, constructive notice of the purpose for which he has them.

It should be remarked, that, though the mere non-production of the deeds is not, alone, constructive notice of a prior mortgage, yet if the person dealing with the mortgagee is apprised that they are in the hands of a third person, this is sufficient to charge him with notice, though he may not have known the fact of their being deposited as a security; since he was bound upon the information he received to make further inquiry. And, therefore, where A. deposited his title deeds with B. (who was his attorney), to secure certain sums of money, and afterwards sold and con-

year now next ensuing; and the like sum of 25*l.*, other part of the said principal sum, at the end of each of the

BY TENANTS FOR LIFE, WITH LIFE INSURANCE.

veyed the estate to C. for a valuable consideration, the deposit-security was established against C., on his admission that he knew the deeds were in the hands of B., but supposed that they were left with him for the purpose of preparing a mortgage to a third person. *Hiern* v. *Mill*, 13 Ves. 114.

Possession of deeds relating to a term, held to give priority among equitable mortgagees.

The mere possession of the title deeds, we have seen, whether obtained before or after the acquisition of the legal estate by the other incumbrancer, without notice, and whether they were originally withheld from him, or were afterwards taken out of his hands, gives the depositary of the deeds no claim against the owner of that estate: but the rule, it should seem, is different as to incumbrancers having *equitable* interests only, with regard to whom the possession of the deeds relating to the legal estate has been held *to be equivalent in equity to obtaining a conveyance of it at law*, and consequently to have the same effect in giving priority to the person having such possession. This was decided in the case of *Stanhope* v. Earl *Verney*, Co. Litt. 290. b., Butl. n.; *S.C.* 2 Ed. C.C. 81; the circumstances of which were as follow:—S. being seised in fee of certain estates, subject to an outstanding term of one thousand years in R. and E., by indentures of lease and release, dated the 4th and 5th days of June 1732, conveyed them to Lady D. and her heirs, for securing 1,000*l.*, and covenanted to produce the title deeds. Afterwards, R. and E. assigned the term to C. and C. in trust for S., his heirs and assigns; and then S., by indentures dated the 18th and 19th of December, 1732, conveyed the same estates to N. by way of mortgage, for securing to her 3,000*l.* and interest, with a declaration that C. and C. should stand possessed of the term in trust for N.; and the deeds respecting it were delivered to her, and neither she nor the trustees had notice of the mortgage to Lady D. Afterwards, Lady D. brought an ejectment; Earl V., who claimed under N., defended it, and set up the term with a declaration of the trust; upon this the representatives of Lady D. brought the present bill for an assignment of the term. The question was, which should be preferred; Lady D., who had the first declaration of the trust of the term*, or Earl V., who had the subsequent declaration of the trust, but had the custody of the deed. Lord *Northington* held, that a declaration of trust in favour of an incumbrancer was tantamount to an actual assignment, unless a subsequent incumbrancer, *bonâ fide*, and without notice, procure an assignment; and that the custody of the deeds respecting the term, with a declaration

* It is to be inferred, though it is not stated, that there was an express declaration of trust of the term in favour of Lady D. It does not appear whether the trustees were parties.

BY TENANTS FOR LIFE, WITH LIFE INSURANCE.

five succeeding years, with interest, at the rate aforesaid, for so much of the said principal sum as shall not have

of the trust of it in favour of a second incumbrancer, was equivalent in equity to an actual assignment, and, therefore, gave him an advantage over the first incumbrancer, which equity would not take from him.

The doctrine of the last case was incidentally recognised by Lord *Eldon* in *Maundrell* v. *Maundrell*, 10 Ves. 271, who remarked, with regard to incumbrancers, that, if they did not get in a satisfied term in some sense, either taking an assignment, making the trustee a party to the instrument, or *taking possession of the deed mentioning the term*, that term could not be used to protect them against any person having mesne charges or incumbrances. And in *Ex parte Knott*, 11 Ves. 613, his Lordship seems even to have been of opinion, that an incumbrancer, having possession of the deeds relating to the term, would prevail against a person taking an actual assignment; it being (as his Lordship thought), a breach of trust in the trustee to assign the term for the benefit of a person not having the deeds; and his Lordship doubted whether the Court would permit the term to be used to the prejudice of the incumbrancer who had them. It is clearly, therefore, not safe for a trustee to assign a term, unless the party calling for the assignment is in possession of the deeds, or at all events shews that they are not in the hands of a person claiming under him as purchaser or mortgagee. If a trustee assigns to a mortgagee a term which is vested in him expressly for the benefit of other persons, this would, of course, be a breach of trust in him, and the mortgagee, having notice of the trust, would take subject to it.

Assignment of term to be preferred to a declaration of trust.

But, to prevent all question upon this point, a mortgagee or purchaser should take care that he not only has the deeds relating to the term, but an actual assignment of it; and it is to be observed, that even an express declaration of trust in his favour, to which the trustees are parties, is not for all purposes equivalent to an assignment in protecting him against the fraudulent acts of the mortgagee, in secretly creating other incumbrances. Thus, in *Frere* v. *Moore*, 8 Price, 475, where M. and his wife, who had a power over the fee, subject to a term in B. as a trustee for them, in 1813, executed a deed of mortgage to the defendant F. for securing 2900*l.* and interest; and B. covenanted with F. and M. and his wife to stand possessed of the term, first, for securing the 2900*l.* and interest to F., and costs, and then in trust for such persons as M. and his wife should appoint. In 1816, M. and his wife, by an indenture, to which B. was also made a party (though he did not execute), appointed the premises to H. in fee, for securing 1200*l.* and interest. In 1817, M. and his wife charged the premises with a further sum to F., he having no notice of the intermediate security to H. The question was, whether the mortgage of 1816 to H., or the mortgage of 1817 to F. had priority. It

been previously paid; and the remainder of the said principal sum; with like interest for the same, at the end of the seventh year from the date hereof (*e*); then these presents, and the grant and (*f*) demise hereby made, and the said term of ninety-nine years, shall cease, determine, and be absolutely void, (any thing herein contained to the contrary notwithstanding); AND the said [*mortgagors*], for themselves jointly and severally, and for their respective heirs, executors, and administrators, do hereby covenant with the said [*mortgagee*], his executors, administrators, and assigns, in manner

BY TENANTS FOR LIFE, WITH LIFE INSURANCE.

Covenants by mortgagors.

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was contended, that the declaration of trust of the term in favour of F. was equivalent to an assignment, and therefore, he, having the egal estate, was entitled to tack his subsequent advances to his original security as against the second mortgagee; but Lord C. B. *Richards* thought the legal estate must be considered as outstanding for the benefit of the several incumbrancers, according to the date of their securities, notwithstanding the declaration of trust in favour of F.; and that the deed of 1813 made no difference; it only entitled him to the benefit of the term to the extent of his original security; though his Lordship admitted, that, if he had taken an assignment, the case would have been different. The principle of this case agrees with that of *Ex parte Knott*, 11 Ves. 609; in which it was admitted that a third mortgagee, who had bought in the first mortgage, could not tack his security to such mortgage, against a mesne incumbrancer (of whose security the third mortgagee had no notice), *there being an outstanding term not got in by any of them.*

(*e*) If a policy is effected on the life of one of the mortgagors, as a collateral security, the whole principal sum should become payable at his death; otherwise the insurance money would be in the hands of the mortgagee, without being immediately applicable to the payment of the debt. In such case, add to the proviso—

"or in case the said [*younger mortgagor*] shall depart this life before the expiration of the said seventh year from the date hereof, then, if the said [*other mortgagor*], his executors, administrators, or assigns, or the executors, administrators, or assigns, of the said [*younger mortgagor*], shall, immediately on such his decease, pay unto the said [*mortgagee*], his executors, administrators, or assigns, the whole of the said principal sum of 170*l.* and interest, or so much thereof as shall remain unpaid, then," &c.

Variation, where mortgage money is secured by a policy of insurance.

(*f*) "assurance hereby made shall cease," &c.

BY TENANTS FOR LIFE, WITH LIFE INSURANCE.

following, that is to say, that they the said [*mortgagors*], or one of them, or the executors, administrators, or assigns of them or of one of them, shall or will pay unto the said [*mortgagee*], his executors, administrators, or assigns, the said sum of 170*l.* and interest, on the several days and by the several instalments hereinbefore mentioned; *And that* they the said [*mortgagors*] have, or one of them has, full right, power, and authority to grant and assure the said messuage and premises unto the said [*mortgagee*], his executors, administrators, and assigns, in manner aforesaid; *And that* after default shall have been made by the said [*mortgagors*], their executors, administrators, or assigns, in payment of the said principal sum and interest, or any part or instalment thereof, according to the proviso hereinbefore contained, it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, to enter upon and hold and enjoy the said messuage and premises, for all the estate and interest hereby granted, without any interruption by the said [*mortgagors*], or any other persons whomsoever, and free from all charges and incumbrances whatsoever; *And moreover*, that they the said [*mortgagors*], respectively, and every other person having any estate, right, title, charge, or interest, in, to, or out of the said messuage and premises, will, at all times hereafter, during the continuance of the estate hereby expressed, or intended to be granted, and so long as any sum or sums of money shall be owing upon this security, at their or his own costs, on the request of the said [*mortgagee*], his executors, administrators, or assigns, make, do, and execute all such acts and assurances for more effectually assuring the said premises unto the said [*mortgagee*], his executors, administrators, and assigns, in corroboration of and according to the true intent and meaning of these presents, as by the said [*mortgagee*], his executors, administrators, or assigns, shall be reasonably required (*g*); PROVIDED ALWAYS, and

To pay mortgage-money.

For quiet enjoyment after default;

And for further assurance.

Proviso for en-

(*g*) If a policy of assurance on the life of one of the mortgagors has been effected by the mortgagee, and is to be kept on foot at the expense of the mortgagors, as a collateral security, add—

Covenant to keep on foot policy of life insurance.

"And also that the said [*mortgagors*], or one of them, his executors, administrators, or assigns, will, so long as

BY TENANTS FOR LIFE, WITH LIFE INSURANCE.

it is hereby declared, that until default shall have been made by the said [*mortgagors*], their executors, administrators, or assigns, in payment of the said principal sum

joyment, until default.

any sum or sums of money shall remain due upon this security, keep on foot a certain policy of assurance, bearing date the —— day of —— last, effected by the said [*mortgagee*] on the life of the said [*younger mortgagor*], in the —— Office in London, for the sum of 150*l.*; or, in case the same, or any policy of assurance to be effected as hereinafter mentioned, shall by any means become void, will effect in the said —— Assurance Office, or in some office of assurance in London or Westminster, to be approved of by the said [*mortgagee*], his executors, administrators, or assigns, and keep on foot, a similar policy of assurance in the name or names of the said [*mortgagee*], his executors, administrators, or assigns, and will, from time to time, immediately after payment of the premiums to become payable in respect of such assurance already effected or to be effected as aforesaid, deliver to the said [*mortgagee*], his executors, administrators, or assigns, the receipts for the same; And in default thereof, it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, to keep on foot, or effect and keep on foot such assurance as aforesaid; and the said [*mortgagors*], or one of them, their or one of their executors or administrators, will, on demand thereof, pay unto the said [*mortgagee*], his executors, administrators, or assigns, such sum or sums of money as he or they shall pay in and about such assurance, with interest for the same after the rate of *5l. per cent. per annum*; and the same sum and sums of money and interest shall be a charge upon the said messuage and premises, and such premises or any part thereof shall not be redeemable by virtue of the proviso hereinbefore contained, until payment by the said [*mortgagors*] or one of them, their or one of their executors, administrators, or assigns, unto the said [*mortgagee*], his executors, administrators, or assigns, of the monies so expended by him or them, and interest thereon as aforesaid, but so, nevertheless, that the total amount of principal money to be ultimately recoverable by virtue of

And deliver receipts for premiums.

Any sums mortgagee may advance to be repaid with interest.

BY TENANTS FOR LIFE, WITH LIFE INSURANCE.

and interest, or some portion or instalment thereof, according to the proviso hereinbefore contained, it shall be lawful for the said [*mortgagors*] respectively, and their respective assigns, to enter upon, and hold and enjoy the said messuage and premises, without any interruption by the said [*mortgagee*], his executors, administrators, or assigns, or any person or persons claiming under him or them. IN WITNESS, &c.

To attend at insurance office, &c.

these presents shall not exceed the sum of 200*l.**: *And also* that the said [*younger mortgagor*] will, from time to time, at the request of the said [*mortgagee*], his executors, administrators, or assigns, attend in person as often as there shall be occasion at any such office of assurance as aforesaid, and give such evidence and information respecting his health, age, or otherwise, as shall be requisite, in order that an assurance may be effected on his life by the said [*mortgagee*], his executors, administrators, or assigns, as aforesaid, and will not do any act or commit any default whatsoever, by means of which the said hereinbefore mentioned policy, or any policy or policies of assurance to be effected as aforesaid, shall become void, or whereby any additional premium or premiums of assurance may be payable; And it is hereby further declared, that the said [*mortgagee*], his executors, administrators, and assigns, shall hold the policy or policies of assurance so effected or to be effected as aforesaid, in the first place for securing to him and them the monies hereby intended to be secured, and, subject thereto, In trust for the said [*younger mortgagor*], his executors, administrators, and assigns. *(See a longer form of covenant to keep on foot a policy of life insurance, and adapted to the case of a mortgage containing a trust for sale, post,* p. 586*).*

Declaration of trust of policy.

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* As to the necessity of a limitation of this kind, *vide ante,* p. 244.

MORTGAGE *in* FEE *of an* EQUITY *of* REDEMPTION, *with Covenant to deliver Title Deeds when former Mortgage is paid off, &c.*

OF AN EQUITY OF REDEMPTION.

THIS INDENTURE, made the —— day of ——, BETWEEN [*mortgagor*], of &c., of the one part; and [*mortgagee*], of &c., of the other part. WHEREAS the said [*mortgagor*] hath applied to and requested the said [*mortgagee*] to advance and lend to him the sum of £——, which the said [*mortgagee*] hath agreed to do accordingly, upon the repayment thereof with interest being secured by a mortgage of the —— and hereditaments hereinafter mentioned, to which hereditaments the said [*mortgagor*] is now entitled in fee-simple, subject to a mortgage in fee thereon for securing the sum of six thousand pounds and interest as hereinafter expressed (*a*). NOW THIS INDENTURE WITNESSETH, that, in consideration of the sum of £—— of lawful money of Great Britain and Ireland, paid by the said [*mortgagee*] to the said [*mortgagor*] in hand, at or before the execution of these

Parties.

Application and agreement for loan.

Testatum.

In consideration of mortgage money.

(*a*) Where the prior mortgage is for a term only, say—

"of which hereditaments the said [*mortgagor*] is now seised in fee-simple, subject to a mortgage thereon for a term of one thousand years, for securing," &c.

Variation, where prior mortgage is for a term only.

Where the first mortgage is for a term, and the second is in fee, it is not correct to stile the latter a mortgage of the equity of redemption, since it embraces not only the interest comprised in the former mortgage (*i. e.* the term), but the reversionary inheritance, which is not affected by it. It is therefore a mortgage of the equity of redemption of the term, and a primary mortgage of the inheritance. The distinction, however, is merely technical, as all the valuable interest in the lands is comprised in the former mortgage, the reversion expectant on a long term being of no value.

OF AN EQUITY OF REDEMPTION.

presents, the receipt whereof he doth hereby acknowledge, and therefrom and from every part thereof doth acquit, release, and discharge the said [*mortgagee*], his heirs, executors, administrators, and assigns by these presents, He the said [*mortgagor*] *Hath* granted, bargained, sold, released and confirmed, *And* by these presents *doth* grant, &c., unto the said [*mortgagee*], his heirs and assigns, (in the actual possession &c.,) (*ut ante*, p. 258 (*b*)). (*Describe parcels with general words).* TO HAVE AND TO HOLD the said ——, and all and singular other the hereditaments hereby granted and released, with their and every of their rights, members, and appurtenances, unto the said [*mortgagee*], his heirs and assigns, TO THE USE of the said [*mortgagee*], his heirs and assigns, for ever, *subject nevertheless* to the proviso or condition for redemption hereinafter contained, (that is to say), PROVIDED ALWAYS, and these presents are upon this express condition, that, if the said [*mortgagor*], his heirs, executors, administrators, or assigns, do and shall pay or cause to be paid to the said [*mortgagee*], his executors, administrators, or assigns, at or in the common dining-hall of Lincoln's Inn, in the county of Middlesex, between the hours of eleven and twelve of the clock in the forenoon, the sum of £—— of lawful money of Great Britain and Ireland, with interest for the same after the rate of 5*l. per centum per annum*, in manner following, (that is to say), the sum of £——, being one half-year's interest of the said sum of £——, after the rate aforesaid, upon the —— day of —— next ensuing, and the further sum of £——, being the whole principal money and one other half-year's interest thereof after the rate aforesaid, upon the —— day of ——, which will be in the year of our Lord ——, without any deduction or abatement whatsoever [out of the same or any part thereof, for or in respect of any rates, taxes, charges, assessments, or impositions whatsoever, now taxed, charged, assessed, or imposed, or hereafter to be taxed, charged, assessed, or imposed on the said —— and hereditaments hereinbefore expressed to be hereby granted and released,

Mortgagor grants to mortgagee.

Habendum.

To the use of mortgagee in fee.

Proviso for redemption.

(*b*) It is usual, though not necessary, to convey an equity of redemption by lease and release. Any instrument which would amount in equity to a charge is sufficient for the purpose.

or any part thereof, or upon the said principal sum of £——, or the interest thereof, or upon the said [*mortgagee*], his heirs, executors, administrators, or assigns, for or in respect of the same or any part thereof, by authority of Parliament or otherwise howsoever], [being the same principal money and interest as are in part secured by the bond of the said [*mortgagor*], bearing even date with these presents (*c*);] then and in such case and from and immediately after payment shall be so made as aforesaid, these presents and the grant and release hereinbefore expressed to be hereby made, and every clause, article, matter, and thing therein contained, shall cease, determine, and be absolutely null and void to all intents and purposes whatsoever, (any thing hereinbefore contained to the contrary thereof in anywise notwithstanding). And the said [*mortgagor*] doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said [*mortgagee*], his heirs, executors, administrators, and assigns, in manner following, that is to say, that he the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall and will pay or cause to be paid unto the said [*mortgagee*], his executors, administrators, or assigns, the sum of £—— of lawful money of Great Britain and Ireland, with interest for the same after the rate aforesaid, at the place and times and in the manner hereinbefore appointed for payment thereof, according to the true intent and meaning of these presents: And also, that he the said [*mortgagor*], now at the time of the sealing and delivery of these presents, hath in himself good right, full power, and lawful and absolute authority to grant, release, and convey the said hereditaments hereinbefore expressed to be hereby granted and released, unto and to the use of the said [*mortgagee*], his heirs and assigns, in the manner aforesaid, according to the true intent and meaning of these presents, (except as hereinbefore is excepted): *And further* that it shall be lawful for the said [*mortgagee*], his heirs and assigns, from time to time and at all times, from and after default shall be made in payment of the said sum of £——, and interest, or any part thereof, contrary to the proviso hereinbefore contained, and the true intent and meaning of

OF AN EQUITY OF REDEMPTION.

Covenant by mortgagor to pay principal and interest monies.

That he has good right to convey.

For quiet enjoyment after default.

(*c*) But as to bonds, *vide ante*, p. 235.

OF AN EQUITY OF REDEMPTION.

these presents, peaceably and quietly to enter into, have, hold, use, occupy, possess, and enjoy, all and singular the said —— and hereditaments hereinbefore expressed to be hereby granted and released, and the rents and profits thereof to receive and take for his and their own use, without any interruption or denial by him the said [*mortgagor*], or his heirs, or any other person or persons whomsoever; *and that* free and clear [and freely and clearly acquitted, exonerated, and discharged, or otherwise, by him the said [*mortgagor*], his heirs, executors, administrators, or assigns, well and sufficiently saved harmless and indemnified, of] from and against all [and all manner of former and other gifts, grants, bargains, sales, leases, mortgages, jointures, dowers, uses, trusts, wills, entails, statutes, recognizances, judgments, extents, executions, and all other estates, titles, troubles,] charges, and incumbrances whatsoever, save and except a certain mortgage created by indentures of lease and release, bearing date respectively on or about the —— and —— days of ——, whereby the said —— and hereditaments were conveyed unto and are now vested in [*prior mortgagee*], of &c., his heirs and assigns (*d*), for securing the sum of six thousand pounds and interest (*e*): *And moreover*, that he the said

Free from incumbrances.

Except prior mortgage.

And for further assurance.

(*d*) If the prior mortgage is for a term, say—

Variation, where prior mortgage is for a term.

"save and except a certain term of one thousand years, created by an indenture of mortgage bearing date the —— day of ——, whereby the said hereditaments were demised unto [*prior mortgagee*], of &c., his executors, administrators, and assigns, for securing the sum of six thousand pounds and interest."

As to mortgages of an equity of redemption.

(*e*) Where a person is about to advance money on an estate which is already in mortgage, he should ascertain from the prior mortgagee the exact amount of his debt*, and see that the mortgage deed does not

* The first mortgagee would clearly be concluded as against the second mortgagee by the representation so made to him. Upon this principle, if A., being about to lend money on B.'s estate, inquires of C., a prior mortgagee, whether he has an incumbrance upon it, *at the same time informing him of the object of the inquiry*, and the latter denies having any, C.'s mortgage would be postponed to A.'s. *Ibbottson* v. *Rhodes*, 2 Vern. 554.

[*mortgagor*] and his heirs, and every other person having or lawfully claiming, or who shall or may at any time here- OF AN EQUITY OF REDEMPTION.

extend to future advances; and he ought also to ascertain that there is no mortgage debt owing from the mortgagor to the mortgagee on any other estate, inasmuch as, we have seen, that the mortgagee in such a case would be entitled to hold both mortgages until both were satisfied; (*vide ante*, p. 400); and therefore, if the other mortgage were a scanty security for the money due upon it, the present estate would probably be resorted to for the deficiency. A second mortgagee should also immediately give notice of his incumbrance, when perfected, to the first mortgagee; for, though he is not bound to do so, and his omission to give notice would not confer any priority on the first mortgagee in respect to subsequent advances, provided they were both upon an equal footing as equitable incumbrancers, the legal estate being outstanding in a third person (*Frere* v. *Moore*, 8 Pri. 475, stated *ante*, p 417, and see *Brace* v. Duchess of *Marlborough*, 2 P. W. 494); yet if, as is commonly the case, the first mortgagee had the legal estate, he would be at liberty to tack any subsequent charge to his original security against an intervening mortgage or judgment creditor, of whose incumbrance he had no notice when he made the farther advance. *Goddard* v. *Complin*, 1 Ch. Cas. 119; *Blackstone* v. *Moreland*, 2 Ch. Cas. 20; *Wrightson* v. *Hudson*, 2 Eq. Ca. Ab. 609, pl. 7. The sums, however, advanced by the first mortgagee must be actually charged upon the estate; and a memorandum merely stating the amount due, would only have the effect of creating a simple contract debt, and not of charging the lands; and no addition could be made to it by oral testimony. *Ex parte Hooper*, 1 Mer. 7.

Mortgagee may tack a judgment.

A first mortgagee may also tack a judgment to his mortgage debt against a mesne mortgage creditor, of whose security he has no notice; *Brace* v. Duchess of *Marlborough*, 2 P. W. 494; *Shephard* v. *Titley*, 2 Atk. 352; and the circumstance of the mortgagor having become bankrupt does not affect the judgment, it having, by the doctrine in question, acquired the character of an actual mortgage. *Baker* v. *Harris*, 16 Ves. 397. But the judgment of course must be a lien upon the land; and therefore the mortgagee of copyhold lands cannot tack a judgment, copyholds not being liable to an execution upon a judgment. *Cannon* v. *Pack*, 6 Vin. Ab. 222, pl. 6; *S. C.* 2 Eq. Ca. Ab. 226, pl. 6. And in order to render a judgment available against mortgagees or purchasers, it must be docketted pursuant to stat. 4 & 5 W. & M. c. 20; but it has been decided that a purchaser or mortgagee is affected by an undocketted judgment, of which he has notice. *Davis* v. Earl of *Strathmore*, 16 Ves. 419.

Judgment creditor advancing

So, where a judgment creditor advances more money to his debtor upon mortgage, without notice of an intervening incumbrance, he is entitled to

OF AN EQUITY OF REDEMPTION.

after have or lawfully claim any estate, right, title, trust, charge, or interest, either at law or in equity, of, in, to, or

money on mortgage.

hold the land against such mesne incumbrancer, until his mortgage and judgment debts are both paid. *Smithson* v. *Thompson*, 1 Atk. 520. But

Second mortgagee may prevent first mortgagee from making further advances by notice;

after giving notice of his incumbrance, &c., to the first mortgagee or judgment creditor, the second mortgagee is secure against further advances being made by either of them; for, a mortgagee or judgment creditor advancing money after notice of an intervening security, would be postponed, as to such further advances, to that security; *Cason* v. *Round*, Pre. Ch. 226;

unless the security extends to further advances.

unless indeed the first mortgage is made to cover future advances; in which case, it is apprehended, the first mortgagee would have priority over a second mortgagee, in respect of all sums advanced by him within the limit, if any, prescribed by the deed, *even after notice of the second incumbrance;* for, a security of this nature is to be regarded, for the present purpose, as a subsisting mortgage for the whole sum to which it extends, whether actually advanced at the time or not, there being, it is conceived, no ground for distinguishing future from precedent advances, since they are equally included in, and form part of the original security. And this view of the case accords with Lord *Cowper's* decision in *Gordon* v. *Graham*, 7 Vin. Ab. 52, pl. 3; *S. C.* 2 Eq. Ca. Ab. 598, pl. 16; where A. mortgaged to B. for a term of years to secure a sum of money then lent to A., and *also such other sums as should thereafter be advanced to him.* A. made a second mortgage to C. *who had notice of the first mortgage*, and then B., *having notice of the second mortgage*, lent a further sum to A. by virtue of the original security. His Lordship decreed that the second mortgagee should not redeem the first mortgage without paying as well the money left *after* as that lent before the second mortgage was made, for it was the folly of the second mortgagee *with notice* to take such security.

Remarks upon *Gordon* v. *Graham.*

It will be seen that Lord *Cowper* relied upon the circumstance of the second mortgagee having notice of the first mortgage; and though the reasons before suggested in favour of the priority of the first mortgagee might seem to apply as well to cases in which the second mortgagee had not, as where he had notice, yet it is not safe to consider the case as an authority to this extent. The learned editor of Mr. *Powell's* Treatise on Mortgages, 5th ed. p. 531, indeed, seems to doubt the soundness of the decision, as applicable even to the case of a second mortgagee with notice; but in those doubts the present writer cannot concur, though, as a difference of opinion appears to exist upon the subject, a mortgagee should hesitate to make farther advances in *any* case after notice of a subsequent incumbrance. On the other hand, no person ought to accept a security subject to a mortgage authorizing further advances, without treating it as an actual incumbrance to that extent.

out of the said —— hereinbefore expressed to be hereby granted and released, or any part thereof, (save and ex-

OF AN EQUITY OF REDEMPTION.

Upon the same principle that a first mortgagee, after notice of a second mortgage, cannot make further advances, unless the deed extends to them, as it not allowed to turn interest into principal as against the second mortgagee, such a transaction being in fact a further advance *pro tanto*. *Digby v. Craggs*, 1 Ed. C. C. 200.

Mortgagee cannot turn interest into principal against prior mortgagee.

And it is to be observed, that the right to take one security to another may be excluded by the apparent intention of the parties, and is confined to mortgages properly so called, and does not apply to conveyances *in trust for sale*. Thus, in a late case, where it appeared that, in 1821, A. advanced 1200*l.* to B., on a deposit of title deeds of a certain estate, and an undertaking to execute a mortgage; in 1822, he advanced B. a further sum of 1350*l.* on the security of the warrant of attorney. In 1824, B. executed a deed of conveyance in trust for sale to A. of the estate in question, under the trusts thereof it was immediately saleable, and the proceeds to be applied in payment of the 1200*l.*, and a sum due for interest on both sums, and the surplus to be paid to B., his executors, &c. On the same day judgment was entered up on the warrant of attorney, and an execution issued, by which part of the judgment debt was satisfied. The question was, whether A. was entitled to tack the judgment debt to the mortgage for the remainder. Sir *J. Leach*, V. C., held, that he was not. He observed, that A., who had an equitable mortgage, had converted himself, not into a legal mortgagee, but into another character, *that of a trustee for sale*, with a direction to pay the surplus to the debtor, *and a separate instrument was executed to secure the other debt.* The right of tacking depended on the principle of avoiding circuity of action; but, in the circumstances of that case, no circuity of action would have reached the surplus, and the principle was inapplicable. *Ex parte Pettit*, 2 Gl. & Jam. 47.

Tacking may be excluded by apparent intention, and not applicable to conveyance in trust for sale.

In this case the creditor was not allowed to tack, even against the assignees in bankruptcy of the debtor, and, *a fortiori*, he could not tack against a subsequent incumbrancer. The security, it will be observed, was not a mortgage with a power of sale in default (*ante*, p. 255), but simply a conveyance in trust for sale. It remains to be determined how far the doctrine would be applicable to an instrument of the former kind, with or without a declaration (*ante*, p. 256) that the creditor's rights, as a mortgagee, shall not be affected by the trust for sale. The Vice Chancellor seems to have assumed, that a judgment creditor had no claim upon the surplus of the monies to arise from the sale; though it has been considered that, in such a case, a trustee for sale, having notice of a judgment subsequent to his conveyance (for of the judgment was pre-

Remarks upon *Ex parte Pettit.*

OF AN EQUITY OF REDEMPTION.

cept the person or persons claiming in respect of the said hereinbefore excepted mortgage), shall and will, from time

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cedent to, it would of course over-reach the conveyance), is bound to pay the judgment creditor out of the surplus, which, by the terms of the deed, was payable to the mortgagor. See Mr. Serjeant *Hill's* opinion, stated in *Forth* v. Duke of *Norfolk*, 4 Madd. 506, n. It seems to be the better opinion, that a judgment after a conveyance in trust for sale is no lien upon the land itself, so as to affect a purchaser or mortgagee, who has even express notice Sugd. Vend. & Purch. 7th ed. 478. The equity of redemption, under a common mortgage, it should be noticed, can only be reached by a judgment creditor in equity, such an interest not being within the 10th section of the statute of frauds. *Lyster* v. *Dolland*, 1 Ves. jun. 431. See *Harris* v. *Pugh*, 12 B. Moore, 577; *S.C.* 4 Bing. 335.

But, independently of the risk which a second mortgagee incurs, of the first mortgagee making further advances without notice, he has another danger to encounter, against which no vigilance can protect him, and it is this: that, if the mortgagor mortgages the land again to a person without notice of the second mortgage, and the third incumbrancer gets in the first mortgage, by means of which he acquires the legal estate, he will be entitled to hold it against him (the second mortgagee) until both debts are satisfied.

Third mortgagee without notice may exclude intervening incumbrancer, by getting in the first.

Thus, where Sir F. D. made the plaintiff a security out of the manor and rectory of W., and then made the defendant a security out of the rectory only, he having no notice of the first security, and afterwards, the defendant, hearing of the plaintiff's security, brought in a security precedent to the plaintiff's, which one B. had upon both the manor and rectory; and the question was, whether the plaintiff should be admitted to redeem his security without paying what was due to the defendant: it was ruled that he should not. *Bovey* v. *Skipwith*, 1 Ch. Cas. 201; see also *March* v. *Lee*, 1 Ch. Cas. 162. In *Bovey* v. *Skipwith*, it was determined that the defendant should hold both the manor and rectory (though his own security only extended to the rectory), till all that was due to him on both securities was paid. So, in the case of *Hasket* v. *Strong*, 1 Stra. 689, where H. made a mortgage for five hundred years to N., and afterwards made a mortgage in fee to the plaintiff. N. assigned to the defendant, who, afterwards advancing more money, took a mortgage of the inheritance, with an agreement that the term should be kept on foot as an additional security. It was held that the defendant was entitled to be paid his whole debt, as against the plaintiff.

Informal charge sufficient to entitle incumbrancer to buy in prior mortgage.

It is not necessary that the incumbrancer, who obtains priority by this means, should have a regular mortgage, purporting to be an immediate conveyance of the lands; any informal instrument which would amount

to time and at all times hereafter, upon every reasonable request of the said [*mortgagee*], his heirs, executors, ad- OF AN EQUITY OF REDEMPTION.

to a charge in equity will be sufficient. Thus, where the plaintiff M., at three several times, advanced T. M. sums of money, taking a memorandum in these terms—"Received of my brother, Mr. S. M., 450*l.* to be secured by mortgage on my S. H. estate." T. M. had before made a mortgage of the estate to the defendant. M. afterwards bought in a prior mortgage, to protect his security against the defendant. Lord *Hardwicke* said, he was of opinion that there was nothing in this case which differed from the common one of a first, second, and third mortgagee, where the last, after having notice of a second mortgage, prior in time to his own, buys in the first incumbrance to protect himself; in that case the second mortgagee shall not redeem, without paying both the first and third mortgage. *Matthews* v. *Cartwright*, 2 Atk. 347.

Mortgagee must claim both mortgages in the same right.

But the mortgagee must be entitled to both incumbrances in the same right; for if he holds one as trustee, and the other beneficially, he will not be permitted to tack them together. *Morret* v. *Paske*, 2 Atk. 53; *Barnett* v. *Weston*, 12 Ves. 130. See also *Frere* v. *Moore*, 8 Price, 417; *S.C.* Patch on Mortgages, App. 448.

Notice, at what period immaterial.

It is clearly immaterial that the third mortgagee, at the time of his getting in the prior incumbrance, was acquainted with the intermediate charge, (if he had no notice of it when he took his security); in fact, it is the discovery of the mesne incumbrance, which generally induces him to do so. Nor is it material that the first mortgagee was aware of the second mortgage, when he conveyed to the third mortgagee. Lord *Eldon*, indeed, in *Mackreth* v. *Symmons*, 15 Ves. 329, inquired if there was any case where a third mortgagee had excluded the second, if the first mortgagee, when he conveyed to the third, knew of the second. This inquiry may be answered in the affirmative: for, in *Hawkins* v. *Taylor*, 2 Vern. 29, where B., an incumbrancer, filed his bill against other incumbrancers, and, pending the suit*, the defendant A., who had the first incumbrance, assigned to C., another defendant, whose incumbrance was subsequent to the plaintiff's; and the question was, whether C. should, by this means, gain priority over B.; and the Lord Chancellor held that he might. It is obvious that, in this case, the defendant A. must have had notice of B.'s (the plaintiff's) security; and it seems to be decisive of the point in question, being in accordance with the more recent decision of Lord *Thurlow*, in *Robinson* v. *Davison*, 1 B. C. C. 63. If it had been *res integra*, there might have been some difficulty in coming to the same conclusion upon general principles of law. (But see Cov. Pow. Mortg. 5th ed. 541, n.)

* But the purchase of a prior incumbrance *pendente lite* must be *before decree*. *Wortley* v. *Birkhead*, 2 Ves. sen. 571.

OF AN EQUITY OF REDEMPTION.

ministrators, or assigns, but at the proper costs and charges in the law of the said [*mortgagor*], his heirs, executors,

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The doctrine, which gives to a mortgagee, acquiring the legal estate, so decisive an advantage over prior incumbrancers, is founded upon the principle that, "where there are two persons that have equal equity, he that has the legal title shall prevail, because there is no equity to take from such person the title that he has gained at law." See Lord *Cowper's* judgment in *Oxwick* v. *Plumer*, 5 Bac. Ab. Gwill. ed. 43.

Second mortgagee may get in a prior judgment.

Upon the same principle, a second mortgagee, without notice, may get in a judgment prior to the first mortgage, and by this means "squeeze out" (as it has been termed,) the mesne incumbrancer. Thus, where S. granted a rent-charge of 200*l.* to H., and afterwards mortgaged the premises for 2,000*l.* to C., and the representatives of C. bought in a judgment precedent to the grant of the rent-charge; H. filed a bill against the representatives of *C.*, and they denying that C. had notice of the rent-charge, and insisting upon being paid what was due to them upon the judgment and mortgage, the plea was held to be good. *Higgon* v. *Syddal*, 1 Ch. Cas. 149; see also *Windham* v. *Richardson*, 1 Ch. Cas. 212. And it is immaterial that the judgment was satisfied at the time, if it can be made available at law. *Edmunds* v. *Povey*, 1 Vern. 187; *S.C.*, 1 Ch. Cas. 208; *Sadler* v. *Bush*, 2 Vern. 30; Lord C. J. *Holt* v. *Smith*, Ib. 279.

But judgment creditor cannot get in prior mortgage, and tack his debt to it.

But a judgment creditor cannot, by buying in a first mortgage, tack his debt to such mortgage, so as to gain priority over an intervening mortgagee or judgment creditor, "because a judgment creditor cannot be called a purshaser*, nor hath he any right to the land; he hath neither *jus in re*, nor *jus ad rem*, and therefore, though he release all his right to the land, he may extend it afterwards. All that he hath by the judgment is a lien upon the land, but it is not certain whether he ever will make use thereof, for he may recover the debt out of the goods of the conusor by *scire facias*, or may take the body, and then, during the defendant's life, he can have no other execution. Besides, the judgment creditor doth not lend his money upon the immediate view or contemplation of the conusor's real estate, for lands afterwards purchased may be extended upon the judgment; nor is he deceived or defrauded, although the conusor of the judgment hath before mortgaged his real estate; as in the case of a mortgagee, if the mortgagor hath before mortgaged his land to another." 5 Bac. Ab. 57, Gwill. ed.; *Brace* v. Duchess of *Marlborough*, 2 P. W. 491; *Anon.* 2 Ves. sen. 262; Lord *Eldon's* judgment in *Ex parte Knott*, 11 Ves. 617.

Purchase by

If a first mortgagee purchases the equity of redemption, he cannot set

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* For some purposes, however, a judgment creditor is certainly a purchaser. See cases on stat. 27 *Eliz.* c. 4, *post*, Vol. 8, p. 168.

administrators, or assigns, make, do, acknowledge, levy, suffer, and execute, or cause to be made, &c., every such

up his mortgage against subsequent incumbrances of which he had notice. *Greswold* v. *Marsham*, 2 Ch. Cas. 170. Nor can the purchaser of an equity of redemption set up a first mortgage which is paid out of his purchase-money against a second incumbrancer, of whose security he had actual or constructive notice; but the mortgage by such payment is extinguished, and the second incumbrance becomes the primary charge. *Toulmin* v. *Steere*, 2 Mer. 210. If, in such a case, the purchaser were unaffected by notice, he would come within the protection of the general rule, applicable to persons who acquiring the legal estate take it discharged from all the equities of which they have no notice. *Greswold* v. *Marsham*, 2 Ch. Cas. 170.

mortgagee of equity of redemption extinguishes his mortgage.

So, where the purchaser pays off an incumbance.

And a third person paying off a first mortgage may lose his priority by neglecting to keep the security on foot, and taking a conveyance *de novo* from the owner of the equity of redemption. Thus, where A. advanced money by which a first mortgage was paid off, and instead of taking a transfer of the security to himself, allowed it to be treated on the face of the deed as a payment by B. the person entitled to the equity of redemption, to whose trustee the legal estate in fee was conveyed; and then by a subsequent deed, reciting that the money paid to the mortgagee was advanced by A., B. in consideration thereof granted to A. an annuity, and his trustee demised the lands to a trustee for A., for securing the annuity; it turned out that there was a second mortgage, of which A. had constructive notice, and this mortgagee now filed a bill of foreclosure against A. and the mortgagor—Sir *J. Leach*, V. C. was of opinion, that A. had precluded himself from setting up the first mortgage in opposition to the second mortgagee, by having had the fee conveyed by the mortgagee in trust for B., and then accepting a demise from such trustee. *Parry* v. *Wright*, 1 Sim. & Stu. 369. In this case, of course, the first mortgage could only have been kept on foot as against the second mortgagee for the principal and interest monies secured thereby; for it was not competent to the first mortgagee and the transferee, behind the back of the second mortgagee, to change the nature of the security, by substituting an annuity for the mortgage.

Person paying off first mortgagee postponed under circumstances.

Where a first mortgagee acquires the equity of redemption by devise, (and the same principle would apply to an heir), he may keep the charge on foot as against subsequent incumbrancers, and, in the absence of any indication of intention to the contrary, will be presumed (there being this purpose to be answered) to intend to do so, whereby his personal representatives will become entitled to the benefit of it. *Forbes* v. *Moffatt*, 18 Ves. 384. The difference between the rule which obtains where a mortgagee acquires the equity of redemption as a vendee, and where he acquires

Devisee of equity of redemption may keep on foot charges.

OF AN EQUITY OF REDEMPTION.

further and other act, conveyance, and assurance in the law whatsoever, for the more effectually and absolutely

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it by devise, does not appear to rest on very solid grounds, but must, it is conceived, be considered as established by authority.

Purchase of an incumbrance for less than the amount due.

And here it should be noticed, that though in the case of a stranger buying an incumbrance, he is entitled to the whole amount secured, without regard to the price given; *Phillips* v. *Vaughan*, 1 Vern. 336; yet, that where a trustee, heir at law, or executor, buys an incumbrance for less than the amount due, he cannot, as against subsequent incumbrancers, claim more than the sum paid. See *Morrett* v. *Paske*, 2 Atk. 54.

General observations.

The contents of this note will serve to shew, in many important particulars, the situation in which a second mortgagee stands in relation to prior and subsequent incumbrancers, and they demonstrate some of the perils to which a person, taking for his security land which is subject to a prior mortgage or judgment debt, is exposed. They suggest, too, that the safest course for a person in this situation is, to pay off the prior mortgage or judgment creditor, and take a transfer of the legal estate or judgment; by which means he will gain a complete protection against the intervening acts of the mortgagor. By acquiring the legal estate from the first mortgagee, he will also thereby become entitled to the possession or rents of the estate. On this subject it should be observed, that a first mortgagee, after notice of a second mortgage, is bound to account to the second mortgagee for rents received by him, and not applied in liquidation of his own debt—and the charge against him, in such a case, is for what "he had or *might have* received since his entry." *Cropping* v. *Cooke*, 1 Vern. 270; and see *Maddocks* v. *Wren*, 2 Ch. Rep. 209. In a late case, Lord *Eldon* stated the relative rights of a first and second mortgagee, as to the possession, as follows:—"If a man has a *legal* mortgage, he has nothing to do but to take possession. If he has only an *equitable* mortgage, that is, if there is a prior mortgage, then, if the prior mortgagee is not in possession, the other may have a receiver without prejudice to his taking possession: if he is in possession, you cannot come here for a receiver; you must redeem him, and then, in taking the accounts, *he will not be allowed any sums he may have paid over to the mortgagor after notice of the subsequent incumbrance.*" *Berney* v. *Sewell*, 1 Jac. & Walk. 649; see also *Bryan* v. *Cormick*, 1 Ch. Cas. 422; *Dalmer* v. *Dashwood*, 2 Cox, 378; *Phipps* v. Bishop of *Bath* and *Wells*, 2 Dick. 608; *Norway* v. *Row*, 19 Ves. 153. And the Court will not take the possession from the first mortgagee, if he will state upon oath that any thing remains due to him. *Quarrell* v. *Beckford*, 13 Ves. 377; *Codrington* v. *Parker*, 16 Ves. 469. (These cases are stated 1 Cov. Pow. Mortg. 299, where much useful information respecting the appointment and office of receiver is collected).

Situation of second mortgagee as to the possession.

Stat. 4 & 5 Wm. & M. c. 16.

This note, though already too much extended, cannot with propriety be

granting, releasing, conveying, and assuring the same —— and hereditaments unto and to the use of the said [*mort-*

OF AN EQUITY OF REDEMPTION.

concluded, without adverting to the stat. 4 & 5 Wm. & Mary, c. 16, which takes away the right of redemption from a mortgagor in certain cases, as a penalty for his fraudulently making securities without giving notice of prior charges. After reciting the mischief, it enacts—"That if any person shall borrow any money, or, for any other valuable consideration, for the payment thereof, voluntarily give, acknowledge, permit, or suffer to be entered against him or them, one or more judgment or judgments, statute or statutes, recognizance or recognizances, to any person or persons, creditor or creditors; and if the said borrower or borrowers, debtor or debtors, shall afterwards take up or borrow any other sum or sums of money of any other person or persons, or, for other valuable consideration, become indebted to such person or persons, and, for securing the repayment and discharge thereof, shall mortgage his, her, or their lands or tenements, or any part thereof, to the said second or other lender or lenders of the said money, creditor or creditors, or to any other person or persons, in trust for, or to the use of, such second or other lender or lenders, creditor or creditors, and shall not give notice to the said mortgagee or mortgagees of the said judgment, &c., in writing, under his, her, or their hand or hands, before the execution of the said mortgage or mortgages, unless such mortgagor or mortgagors, his, her, or their heirs, upon notice to him, her, or them, given by the mortgagee or mortgagees of the said lands and tenements, his, her, or their heirs, executors, administrators, or assigns, in writing, under his, her, or their hands and seals, attested by two or more sufficient witnesses, of any such former judgment or judgments, statute or statutes, recognizance or recognizances, shall, within six months, pay off and discharge the said judgments, &c. and all interest and charges due thereupon, and cause or procure the same to be vacated, or discharged by record, that then the mortgagor and mortgagors of the said lands and tenements, his, her, or their heirs, executors, administrators, or assigns, shall have no benefit or remedy against the said mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns, or any of them, in equity or elsewhere, for redemption of the said lands and tenements, or any part thereof, but the said mortgagee and mortgagees, his, her, or their heirs," &c. shall enjoy the lands as if the same had been absolutely purchased.

If any persons mortgage lands without giving notice of prior judgments, &c.

And shall not upon notice within six months pay off the judgments, &c.

Such person shall be excluded from his right of redemption.

"And if any person shall mortgage any lands or tenements to any person or persons, for security of money lent, or otherwise accrued or become due, or for other valuable considerations; and if the said mortgagor or mortgagors shall again mortgage the same lands or tenements, or any part thereof, to any other person or persons for valuable consideration, (the said former mortgage being in force and not discharged), and shall

So as to persons mortgaging lands without notice of a prior mortgage.

OF AN EQUITY OF REDEMPTION.

gagee], his heirs and assigns, for ever, (but subject nevertheless to the said hereinbefore excepted mortgage), as by him the said [*mortgagee*], his heirs, executors, administrators, or assigns, or his or their counsel learned in the law, shall be reasonably devised, or advised, and required; *And also* that he the said [*mortgagor*], his heirs or assigns, shall and will, from time to time and at all times hereafter, whilst the said sum of six thousand pounds secured by the said hereinbefore mentioned mortgage, and also the said sum of £ —— hereby secured, or any part thereof, shall remain due and owing upon the security of the aforesaid —— and hereditaments, at his or their own costs and charges, procure, make, and give to the said [*mortgagee*], his executors, administrators, and assigns, whensoever thereto required by him or them, true copies of all and every the deeds, evidences, and writings mentioned and specified in the schedule hereun-

To deliver attested copies while prior mortgage subsists.

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not discover to the said second or other mortgagee or mortgagees, or some or one of them, the former mortgage or mortgages, *in writing*, under his, her, or their hands, that then, and in those cases also, the said mortgagor or mortgagors, his, her, or their heirs, executors, administrators, or assigns, shall have no relief or equity of redemption against the said second or after mortgagee or mortgagees, his, her, or their heirs, executors, administrators, or assigns, upon the said after mortgage or mortgages, but that such mortgagee or mortgagees, his, her, or their heirs," &c. shall hold the lands, estate, and term therein as if the same had been an absolute purchase.

Proviso.

Proviso, that the sub-mortgagees shall have power to redeem any former mortgage or mortgages, and that the act shall not extend to bar any widow of any mortgagor, not joining with the husband, from her dower.

Cases out of the statute.

In the case of *Stafford* v. *Selby*, 2 Vern. 589, (which is the only case that has arisen upon the statute), a plea of this statute by the assignee of a mortgagee was overruled, on the ground of unfair and dishonest practices on the defendant's part, the statute being intended, the Lord Keeper observed, "To recompense honest mortgagees for the trouble, hazard, and charge they might be put to, and not to cover a fraud or ill practice in obtaining an assignment of a mortgage." His Lordship also thought, that the statute did not apply, where the second mortgage included lands not comprised in the first, unless the addition was merely of an acre or two, as a contrivance to evade the statute. It was admitted in this case, that a subsequent mortgagee, or any other person taking an assignment of a mortgage which was within the statute, was entitled to hold the estate irredeemably.

der written or hereunto annexed (*f*): *And further*, that if the said sum of six thousand pounds and all interest for the same shall be paid off and discharged during the time that the said sum of £—— hereby secured, or any part thereof, shall remain due and owing, then the said [*mortgagor*], his heirs or assigns, shall and will, immediately thereupon, deliver or cause to be delivered into the hands of the said [*mortgagee*], his executors, administrators, or assigns, all and singular the same deeds, evidences, and writings, for the better evidencing, maintaining, defending, and proving the right and title of him the said [*mortgagor*], his heirs, executors, administrators, or assigns, in and to the said manors and hereditaments hereby mortgaged as aforesaid; PROVIDED ALWAYS, and it is hereby declared and agreed, that, until default shall be made in payment of the said sum of £—— and interest, or some part thereof, contrary to the proviso and covenant hereinbefore contained, it shall be lawful for the said [*mortgagor*], his heirs and assigns, peaceably and quietly to hold and enjoy the said —— and hereditaments hereinbefore expressed to be hereby granted and released, and to receive the rents and profits thereof, for his and their own use, without any interruption or denial whatsoever by him the said [*mortgagee*], his heirs, executors, administrators, or assigns, or by any other person or persons lawfully claiming or to claim from or under him or them. *And lastly*, the said [*mortgagee*] doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said [*mortgagor*], his heirs, executors, administrators, or assigns, that if the said [*mortgagor*], his heirs, executors, administrators, and assigns, do and shall from time to time, yearly and every year, during so long time as the said principal sum of £——, or any part thereof, shall remain due and owing upon the present security, pay or cause to be paid unto the said [*mortgagee*], his executors, administrators, or assigns, upon the —— day of ——, and the —— day of

OF AN EQUITY OF REDEMPTION.

And upon payment thereof to deliver originals.

Proviso for mortgagor's enjoyment until default.

Covenant to accept reduced interest, if paid within a given period.

(*f*) There is in general an objection to scheduling deeds in a mortgage, inasmuch as it prevents, on future occasions, the deeds thus referred to from being detached from the title, so long as the mortgage deed forms part of it.

OF AN EQUITY OF REDEMPTION.

——, in every year, or within two calendar months next after every of the same days, interest after the rate of 4*l.* 10*s.* *per centum per annum*, for or in respect of the said sum of £ ——, or so much thereof as shall, from time to time, remain due and owing upon the present security, then, and in such case, but not otherwise, he the said [*mortgagee*], his executors, administrators, or assigns, shall and will, from time to time, receive and accept such payments as are last mentioned, when and so often as the same shall be made, in lieu and satisfaction of and for the interest after the rate of 5*l.* *per centum per annum*, first hereinbefore stipulated to be paid for the same principal sum; And shall and will, from time to time, give receipts accordingly for the whole interest on the said principal sum, or such part thereof as shall then remain due and owing upon this present security as aforesaid, (any thing hereinbefore contained to the contrary thereof notwithstanding) (*g*). In witness, &c.

Parol agreement to reduce interest good.

(*g*) As to the clauses of this nature, *vide ante*, p. 318. It has been decided that an oral agreement for the reduction of interest secured by a mortgage deed is good. *Milton* v. *Edgeworth*, 5 B. P. C. Toml. ed. 313.

IN TRUST FOR SALE TO SECOND MORTGAGEE.

CONVEYANCE *in* Trust *for* Sale *(subject as to part of the Property to a Mortgage for a Term), to secure the Payment of an existing Debt by* Instalments: Trust *for* Sale *to be exercised in case of Non-payment of any Instalment, and also in case of Non-payment of prior Mortgage Debt, when called in. Prior Mortgage Debt to be paid out of Purchase-Money.*

Parties.

THIS INDENTURE, made the —— day of ——, in the year of our Lord ——, Between [*mortgagor*], of &c., of the first part; [*mortgagees*], of &c., of the second

part; and [*trustee for sale*], of &c., of the third part. WHEREAS the said [*mortgagor*] now stands justly indebted to the said parties hereto of the second part (*a*), in the sum of £——, for money lent and advanced by them to him. AND WHEREAS the said [*mortgagor*] hath applied to the said parties hereto of the second part, for time to pay the same debt, and hath proposed to liquidate the same with interest from the date of these presents, by the instalments, and at the times hereinafter particularly mentioned; and to secure the payment thereof by a conveyance in fee, by way of mortgage, of the freehold messuages, lands, and other hereditaments hereinafter described, to be made to the said [*trustee for sale*], upon and for the trusts, intents, and purposes hereinafter expressed, and to which proposal they the said parties hereto of the second part have consented and agreed. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said recited agreement on the part of the said [*mortgagor*], and in consideration of the aforesaid sum of —— pounds of lawful money of Great Britain and Ireland, so due and owing from him to the said [*mortgagees*] as hereinbefore mentioned, the existence of which said debt or sum of —— pounds, he the said [*mortgagor*] doth hereby admit and acknowledge, and thereof and therefrom doth acquit, release, and discharge the said [*mortgagees*], their heirs, executors, administrators and assigns for ever by these presents, and for the purpose of securing the re-payment of the said sum of —— pounds and interest, he, the said [*mortgagor*], as well pursuant to, and by virtue and in exercise of the several powers and authorities to him for this purpose given by a certain indenture of feoffment, bearing date on or about the —— day of ——, and made between [A. B.] of the first part, the said [*mortgagor*] of the second part, and [*trustee to prevent dower*] of the third part, (so far as respects the piece or parcel of land and the messuage thereon since erected and built, situate in ——, and first hereinafter described); *And* by a certain inden-

IN TRUST FOR SALE TO SECOND MORTGAGEE.

Recital that mortgagor is indebted to mortgagees,

And had requested time for payment,

And proposed the present security.

Testatum.

In consideration of debt,

Mortgagor, pursuant to the powers contained in certain deeds here referred to,

(*a*) Where the parties are numerous, as was the case in this instance, it is convenient to refer to them in these terms. In such cases, too, it is convenient to vest the power of sale in a trustee.

IN TRUST FOR SALE TO SECOND MORTGAGEE.

ture of release, bearing date on or about the —— day of ——, and made between [A. D.] of the one part, and the said [*mortgagor*] and [*trustee to prevent dower*] of the other part, (so far as respects the freehold messuages, cottages, lands, and hereditaments secondly hereinafter described); and all other powers and authorities whatsoever enabling him in this behalf, as also in respect of his estates and interests in all and singular the said hereditaments, in default of the exercise of such several powers of appointment, *hath* directed, limited, and appointed, and also granted, bargained, sold, aliened, released, and confirmed, and by this deed or writing by him signed, sealed, and delivered in the presence of, and attested by the two persons whose names are intended to be indorsed hereupon, as witnesses in that behalf, *doth* irrevocably direct, limit, and appoint; *And* by these presents *doth also* grant, &c. unto the said [*trustee for sale*], [in his actual possession now being by virtue of a bargain and sale to him thereof made by the said [*mortgagor*], in consideration of five shillings, by indenture bearing date the day next before the day of the date of these presents, for the term of one whole year, commencing from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession,] and his heirs; *All that* piece or parcel of land, &c., *(describing it, and the messuages thereon,)* and which said piece of land, messuages, and other hereditaments are the same as are comprised in the indenture of feoffment of the —— day of ——, and hereinbefore referred to as meant to be first herein described; *And also* all that messuage or tenement of him the said [*mortgagor*], now divided into two tenements or dwellings, situate in —— aforesaid, with the houses, outhouses, edifices, buildings, yards, gardens, and appurtenances thereto belonging; *And also* all that other messuage, *(describing it)*, and which said several last described messuages and hereditaments are the same as are comprised in the said indenture of release of the —— day of ——, and hereinbefore referred to as meant to be secondly herein described; and the same are subject to a mortgage by demise made thereof by the said [*mortgagor*] to [*prior mortgagee*], of &c., for the term of five hundred years, by an indenture dated the —— day

appoints, and he also releases,

Unto trustee and his heirs.

Parcels first described.

Parcels secondly described.

Reference to subsisting mortgage.

of ——, for securing the repayment of the sum of three hundred pounds, and interest, as in the same indenture mentioned; and the whole of which said principal sum is now due and owing on the said mortgage security, with interest thereon from the —— day of —— last: *Together* with all and singular outhouses, edifices, buildings, yards, ways, paths, passages, waters, water-courses, lands, commons, common of pasture, profits, privileges, lights, easements, areas, advantages, and appurtenances whatsoever, to the said messuages, land, and other hereditaments hereby appointed and released, or intended so to be, or any part thereof, belonging or in anywise appertaining, or to or with the same, or any part thereof, now or heretofore demised, used, occupied, or enjoyed; AND the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits, of all and singular the aforesaid messuages, lands, and other hereditaments; *And all* the estate, right, title, interest, use, trust, property, benefit, claim, and demand whatsoever, of the said [*mortgagor*], in, to, and upon the same hereditaments: To HAVE AND TO HOLD the messuages, lands, and all other the hereditaments hereby appointed and released, or intended so to be, and every part thereof, unto the said [*trustee for sale*], his heirs and assigns, To THE ONLY USE and behoof of him the said [*trustee*], his heirs and assigns, for ever; [*But subject, nevertheless,* as to the several messuages and other hereditaments secondly hereinbefore described, to the said mortgage made thereof to the said [*prior mortgagee*], for the said sum of three hundred pounds, and interest, and the said term of five hundred years created for securing the same, as aforesaid], upon and for the trusts, intents, and purposes, and with the powers hereinafter declared concerning the same: that is to say, *Upon trust,* in case the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall and do well and truly pay, or cause to be paid, to the said [*mortgagees*], their executors, administrators, or assigns, the said sum of —— pounds of lawful money of Great Britain and Ireland, with interest for the same at the rate of five pounds for every one hundred pounds for a year, by or in the instalments, and at the days or times following; that is to say, the sum of —— pounds, part of the said principal

IN TRUST FOR SALE TO SECOND MORTGAGEE.

General words.

And the reversion, &c.

And all the estate, &c.

Habendum.

To the use of trustee in fee.

In trust in case mortgagor shall pay mortgage money by instalments.

IN TRUST FOR SALE TO SECOND MORTGAGEE.

sum of —— pounds, together with interest for the whole of the same principal sum from the day of the date of these presents at the rate aforesaid, on the —— day of —— now next ensuing; the sum of —— pounds, further part of the then remaining principal sum of —— pounds, with interest at the rate aforesaid on the last-mentioned sum, from the said —— day of ——, on the —— day of —— now next ensuing; and the further or remaining principal sum of —— pounds, together with interest for the same at the rate aforesaid, from the said —— day of —— next, on the —— day of —— now next ensuing, without any deduction or abatement whatsoever out of the same principal and interest monies, or any part thereof respectively, upon any account whatsoever; then and in such case, and in the meantime, until default shall be made in payment of the said principal and interest monies, or some part thereof; and also in case the said [*prior mortgagee*], his executors, administrators, or assigns, shall, at any time before such payment shall be wholly made, call in his said mortgage debt and interest, then, if the same shall be forthwith paid off and discharged, as hereinafter mentioned, UPON TRUST, to permit and suffer the said [*mortgagor*], his heirs and assigns, to retain the possession, and receive and take the rents and profits of the several messuages, lands, and other hereditaments hereby appointed and released, or intended so to be, subject as aforesaid as to the premises secondly described; and in case and when the whole of the said principal sum hereby secured, and interest, shall be duly paid and discharged at the times and in manner aforesaid, UPON TRUST, thereupon, or at any time thereafter, at the request, costs, and charges, of the said [*mortgagor*], his heirs or assigns, to reconvey to him and them, or as he or they shall order and direct, the several messuages, lands, and other hereditaments hereby appointed and released, or intended so to be, as aforesaid, or so much thereof as shall not have been sold under the trusts hereinafter declared, free from all incumbrances to be made or permitted by the said [*trustee for sale*], his heirs or assigns, in the meantime; *But subject*, as to the premises secondly hereinbefore described, to the aforesaid mortgage made thereof to the said [*prior mortgagee*], as hereinbefore mentioned. BUT in case the said [*mortgagor*], his heirs, executors,

And in case mortgagor shall pay off prior mortgage when called in.

Upon trust to reconvey to mortgagor.

But in case of

IN TRUST FOR SALE TO SECOND MORTGAGEE.

administrators, and assigns, shall make default in payment of the said sum of —— pounds, and interest, or any instalment or part thereof, respectively, at such times and in such manner as are hereinbefore for that purpose appointed; or if the said [*prior mortgagee*], his executors, administrators, or assigns, shall call in or demand payment of his aforesaid mortgage debt or sum of —— pounds, and the interest thereof, and the said [*mortgagor*], his heirs, executors, administrators, and assigns, shall refuse or neglect forthwith to pay off and discharge the same, then and in any such case, and immediately thereupon, the said principal sum of ——— pounds and interest, hereby intended to be secured, or so much thereof respectively as shall then remain unpaid, shall no longer be payable in the instalments and at the times hereinbefore for that purpose appointed; but the whole of the same sum and interest, or the residue thereof then remaining unpaid, as the case may be, shall forthwith become and be payable to, and recoverable by, the said [*mortgagees*], their executors, administrators, or assigns, as a present debt, any thing herein contained to the contrary notwithstanding; *And* the said [*trustee for sale*], his heirs and assigns (*b*), shall stand and be seised

default in payment of any instalment;

or mortgagor shall not pay off prior mortgage debt when demanded;

then the whole of the monies hereby secured to be immediately payable;

and trustee thereupon to enter and sell.

(*b*) Some persons entertain doubts whether a trust for sale vested in a mortgagee, his heirs and *assigns*, can be exercised by his alienee. In a case which recently came under the Editor's observation, a title was objected to, on the ground that the sale was made by the devisee of a surviving trustee for sale, whose trust was limited in these terms. It was alleged by the objector, that though the *estate* was, by means of the will, vested in the devisee, yet the *discretion* resided in the heir; and that the only mode of curing the difficulty was, to unite the two, (*i. e.* the estate and the trust), by clothing the heir with the estate. This contrivance, however, the Editor thought was either inefficient or unnecessary; for, if the discretion was so annexed to the estate, that the heir could not sell, and yet did not pass to the devisee with the estate—(a proposition which seems rather paradoxical), the testator had, by separating them, put an end to the trust, and no subsequent acquisition of the estate by the heir could revive it; but if, on the other hand, the trust was in the heir, notwithstanding the devise, and he, being afterwards clothed with the estate, was capable of selling, he might clearly have sold without it, and, instead

Whether alienee of mortgagee can exercise power of sale.

IN TRUST FOR SALE TO SECOND MORTGAGEE.

of, and interested in, the said messuages, lands, and other hereditaments hereby appointed and released, or intended so to be; UPON TRUST, thereupon, or at any time afterwards, to enter into the possession, or receipt of the rents and profits of the messuages, lands, and other hereditaments hereby appointed and released, and at any time or times thereafter (*c*), [at the request, in writing, of the said parties hereto of the second part, or the survivors or survivor of them, or the executors or administrators of such survivor, or their or his assigns], absolutely to sell and dis-

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of taking the conveyance to himself, have directed the devisee, as his trustee, to convey it to a purchaser. There seems, however, to be no valid ground for objecting to the power of the devisee to sell in such a case; and of this opinion was a gentleman of great eminence, to whom the point was submitted in the instance alluded to. Both principle and convenience require that the trust should be held to devolve with the estate, on whomsoever it falls, either by the act of the parties, or by operation of law. To construe it as personal to the mortgagee, or as descending upon the heir distinctly from the legal ownership, is at direct variance with the intention of the parties, as expressed in the positive terms of the instrument.

The point is only material, when the junction of all the persons beneficially interested in the purchase-money cannot be obtained; for the objection is, that the owner of the legal estate, not being invested with the power of sale, is incompetent to discharge the purchaser from seeing to the application of the purchase-money; (*Crewe* v. *Dicken*, 4 Ves. 100; and *vide* this and other cases, stated *ante*, Vol. 4, pp. 70, 74); and this objection, of course, is removed, when the parties entitled to it themselves acknowledge the receipt. In preparing trusts and powers of sale, care should be taken that the power to sell and the authority to give discharges to purchasers, are co-extensive *i. e.* are given to precisely the same persons; for a discrepancy between them raises the question as to how far the one is controlled by the other. (See *Townsend* v. *Wilson*, 1 Barn. & Ald. 608; but, as to which case, see Jacob, 193). And this is a species of inaccuracy very commonly met with. It has been decided, that a power of sale in a mortgage deed given to a person and his *heirs* is not so clearly exercisable by the *assigns* of the heir, though the power to give discharges for the purchase-money is expressly extended to them, as to enable the alienee of the heir to enforce the contract against a purchaser. *Bradford* v. *Belfield*, 2 Sim. 264.

(*c*) See some observations as to the validity of trusts for sale, limited indefinitely in regard to time, 1 Jarm. Pow. Dev. 248.

pose of the same messuages, lands, and other hereditaments, either together or in parcels, and by public sale or private contract; (and, when offered to sale by public auction, to buy in and again offer the same, or any part thereof, for sale, from time to time, as shall be thought fit), without the consent or concurrence of the said [*mortgagor*], his heirs, executors, administrators, or assigns, unto any person or persons whomsoever, for the best price or prices in money that can or may be reasonably obtained for the same, *And* for that purpose to enter into, make, and execute all necessary contracts with, and conveyances to, the purchaser or purchasers thereof, or as he, she, or they shall direct; *And it is hereby agreed and declared between and by all the parties hereto*, [that every sale, conveyance, assurance, act, deed, matter, and thing, which shall be made, done, or executed by the said [*trustee for sale*], his heirs or assigns, of and concerning the premises hereby authorized to be sold as aforesaid, shall be as valid and effectual in the law, though the said [*mortgagor*], his heirs or assigns, shall not execute the same, or join therein, or assent thereto, as such conveyance, assurance, act, deed, matter, and thing would have been if the said [*mortgagor*], his heirs or assigns, had duly executed the same or joined therein, or assented thereto; *And*] that the receipt or receipts in writing of the said [*trustee for sale*], his heirs or assigns, shall be a sufficient and effectual discharge or discharges to any purchaser or purchasers of all or any part of the same hereditaments and premises, for his, her, or their purchase-money or monies, or so much thereof respectively as shall be thereby acknowledged to be received; *And* that the same purchaser or purchasers, his, her, or their heirs, executors, administrators, or assigns, shall not afterwards be answerable or accountable for the loss, misapplication or non-application, or be in anywise obliged or concerned to see to the necessity of raising the money in such receipt or receipts acknowledged to be received, or any part thereof, nor shall such person or persons be bound or obliged to inquire into or ascertain whether the several circumstances upon which the present trust or power of sale is hereby declared or given, or any of them, shall have taken place or arisen, or exist, nor shall the validity of his or their purchase or purchases be afterwards impeached

IN TRUST FOR SALE TO SECOND MORTGAGEE.

With liberty to buy in at any auction.

Contracts and conveyances by trustee to be valid.

Trustee's receipt to be a good discharge to purchasers.

Purchasers not obliged to inquire into the necessity of sales.

IN TRUST FOR SALE TO SECOND MORTGAGEE.

Declaration of the trusts of purchase money.

or impeachable on the ground that he or they had express notice that the circumstances, or any of them, had not actually taken place or arisen, or did not in fact exist; AND *it is hereby agreed and declared between and by the parties hereto,* that the said [*trustee for sale*], his heirs or executors, administrators, and assigns, shall stand and be possessed of, and interested in, the monies to arise from the sale or sales of all or any of the messuages and other hereditaments hereby authorized to be sold as aforesaid, and the rents and profits thereof, after having entered into the possession or receipt of the rents and profits of the same premises, until the same shall be so sold, upon and for the trusts, intents, and purposes following, that is to say,

First, to pay costs;

IN TRUST, in the first place, to pay and satisfy, or retain to himself or themselves, thereout, all costs and expenses attending such sale or sales, or attempted sale or sales, or otherwise to be incurred in the execution of the trusts hereby declared;

Secondly, to pay off prior mortgage debt;

And, in the second place, to pay and satisfy thereout to the said [*prior mortgagee*], his executors, administrators, or assigns, his aforesaid mortgage debt of —— pounds (*d*), so due to him on the security of the

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Mortgagee entitled to notice of payment of money.

(*d*) A mortgagee, whose money is not paid on the day appointed by the proviso, is entitled to six calendar months' notice, previously to its being paid; *Sharpnell* v. *Blake,* 2 Eq. Ca. Ab. 603, pl. 34; and therefore, where a trustee for sale is to pay off a prior mortgagee out of the proceeds of the sale, he should give the mortgagee the requisite notice, unless he can induce him to accept it without notice. The tender must be made on the precise day of the expiration of the notice; if not, the mortgagee may claim another six months' notice. *Hix* v. *Ling,* 2 Pow. Mortg. 5th ed. 934; 5 Supplem. Vin. Ab. 261. And the notice must be positive, and not consist of a proposal merely. See 2 Ves. sen. 372, 678. If the mortgagee refuse to receive his money after due notice, interest will cease to run from the time of the tender. *Lutton* v. *Rodd,* 2 Ch. Cas. 206.

Interest stops after notice and tender.

As to tender of re-conveyance.

But the mortgagor tendering the money has no right to require the mortgagee at the same time to execute a deed of re-conveyance without having previously given him an opportunity of examining it; for which purpose the draft or the engrossment should be sent to the mortgagee's attorney a reasonable time before the period fixed for the payment of the money. *Wiltshire* v. *Smith,* 3 Atk. 89. If this be not done, the mortgagee can only require the delivery of the title deeds when he pays his money, and must get the re-conveyance executed afterwards. (Much in-

hereditaments secondly hereinbefore described as aforesaid, and the interest thereon, or so much of the same

IN TRUST FOR SALE TO SECOND MORTGAGEE.

convenience frequently arises from the neglect of persons to obtain a reconveyance when a mortgage is paid off). And in order to stop the interest, the money must continue ready for the mortgagee at all times subsequently to the tender, no profit being made of it; for, if this be not the case, and the money be not forthcoming when the mortgagee demands it, the interest will run on as if no tender had been made. *Gyles* v. *Hall*, 2 P. W. 378; see also *Lutton* v. *Rodd*, 2 Ch. Cas. 206.

What amounts to a good tender.

In strictness, the tender should be made in coin, but a tender of Bank of England notes would probably be held good, if not objected to *on that ground* at the time. The rule was so laid down by Mr. Justice *Buller*, in *Wright* v. *Reed*, 3 Durnf. & East, 554; and has been since followed in other cases; *Holland* v. *Phillips*, 6 Esp. 46*; and see *Grigby* v. *Oakes*, 2 Bos. & Pull. 529; but the soundness of it may be questioned; for if an offer is made of that which a man is not bound to receive, and he refuses generally to receive it, does it not seem fair to refer his refusal to the circumstance which constitutes a valid objection to the alleged tender? If, however, the person to whom the tender is made *expressly* object to it on another ground, the case stands upon a different footing, and the objection to the *form* of the tender would, it is apprehended, be held to be waved. On this principle it has been decided, that though, in order to constitute a legal tender, the offer should be of the exact sum, and not of a larger sum, *requiring change*; *Betterbee* v. *Davis*, 3 Camp. 70; *Robinson* v. *Cook*, 6 Taunt. 336; see also *Strong* v. *Harvey*, 11 J. B. Moore, 83; yet if, upon a bank note being presented as the tender of a fractional sum, the creditor expressly refuse to receive it *because more is due to him*, he cannot afterwards object to the mode of the tender. *Black* v. *Smith*, Peake, N. P. 88; *Saunders* v. *Graham*, Gow, 122; *Cadman* v. *Lubbock*, 5 Dowl. & Ryl. 289; see also *Cole* v. *Blake*, Peake, 238. It should be observed, that, for the purposes of a tender, there is no particular efficacy in a note of the Bank of England, as distinguished from that of any other bank; and therefore, where such a note is a good tender

Bank Restriction Acts.

* The circumstance that this case occurred during the operation of the Bank Restriction Act of 37 Geo. 3, c. 45, does not render its authority the less conclusive, as that act made Bank of England notes a good tender for some purposes only, as to prevent arrests, &c.; and such a tender was clearly no bar to an action. *Grigby* v. *Oakes*, 2 Bos. & Pull. 526. The stat. 52 Geo. 3, c. 50, rendered a tender of bank notes available to prevent a distress for rent. It is scarcely necessary to add, that these acts are now repealed. See stat. 1 & 2 Geo. 4, c. 26.

IN TRUST FOR SALE TO SECOND MORTGAGEE.

principal and interest monies as shall be then due and unpaid, together with all costs and expenses, if any, at-

for want of objection to it at the time, it is conceived any other note would be equally so. Indeed, Lord *Kenyon*, in *Lockyer* v. *Jones*, Peake, N. P., 180, n., held, that the tender of a Liverpool bank bill of exchange was good, the creditor having, according to the doctrine just noticed, waved his objection to the *form* of the tender, by excepting only to its *amount*. In making a tender, the money must be actually produced, unless the creditor expressly dispense with its production, by declaring that he will not accept it if produced. It must also be unconditional; and an offer to pay, on the creditor giving a stamped receipt, is not a good tender; for, by the stat. 43 Geo. 3, c. 126, the debtor may bring a receipt stamp, and require the creditor to sign it and pay the amount of the stamp; and if he refuse, he is liable to a penalty of 10*l*. *Laing* v. *Reader*, 1 Car. & Payne, 257. Tender of mortgage money may, of course, be made to an agent, if authorized to receive it. See *Goodland* v. *Blewitt*, 1 Camp. 477; *Moffat* v. *Parsons*, 5 Taunt. 347; *Meade* v. *Bandon*, 2 Dow, 268; *Dickinson* v. *Shee*, 4 Esp. 66.

Notice when not necessary.

The object of requiring notice previously to the payment of the money, is to prevent the mortgagee being taken by surprise, and the money suddenly forced upon him when he has not the means of employing it to advantage, by which a loss of interest would be incurred. If, therefore, it be paid in pursuance of a demand made by him, (and the commencement of proceedings, either at law or in equity, for the recovery of the money or the land, would clearly amount to such a demand), notice is not requisite. *Sharpnell* v. *Blake*, 2 Eq. Ca. Ab. 303, pl. 34.

And the same rule, of course, applies where a day is, by mutual consent, appointed for repayment of the money. Thus, where the mortgagee signed a memorandum, agreeing to reconvey the mortgaged premises on the payment of the debt on a given day, and (he having died in the interval,) it was tendered on that day to his executors, who refused to receive it, they were held not to be entitled to interest after the day. *Austen* v. Executors of *Dodwell*, 1 Eq. Ca. Ab. 318, pl. 9. But if in such a case the money was not tendered on the day, the agreement would be at an end, and the mortgagee would be entitled to the usual notice.

Whether mortgagee can accept interest in advance in lieu of notice.

And it is said that an offer from the mortgagor to pay six months' interest in advance, will be equivalent to a notice; 2 Cas. & Op. 51; but the acceptance of interest for a period during which the money is in the mortgagee's hands, is frequently objected to, as rendering the transaction usurious. A difference of opinion seems to be entertained upon this point, and therefore a mortgagee ought not to incur the risk. If the payment were held not to be usurious, it seems to follow, that the tender would be sufficient; but this, as well as the principal question, is far too doubtful for

IN TRUST FOR SALE TO SECOND MORTGAGEE.

tending the non-payment thereof; yet, so that the same last-mentioned messuages and hereditaments shall not be rendered further or more extensively liable than the same were immediately before the execution of these presents; *And* that the said principal and interest monies shall be discharged as aforesaid, only in case the hereditaments on which the same stand secured shall be actually sold under the present trust, and so far only as the monies arising from such sale shall actually extend to discharge the same (*e*); *And* after such principal and interest monies, and costs, if any, shall be fully paid and satisfied as aforesaid (*f*), UPON TRUST, in the third place, to pay and satisfy thereout to the said [*mortgagees*], their executors, administrators, or assigns, the said sum of £——, and the interest thereon, or so much and such parts of the said principal and interest monies, or any of them, as shall be then due and unpaid, together with all costs and expenses, if any, attending the non-payment thereof respectively:

Thirdly, to pay present mortgagees their debt;

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a mortgagor to rely upon such a tender as stopping the interest. An agreement not to pay off mortgage money without six months' notice, has been held to mean calendar months; *Dyer* v. *Sweeting*, Willes, 588; and the same construction would undoubtedly be given to a notice; though, in this and other cases, certainty, which, as Lord *Coke* says, is "the mother of repose and quietness," (Co. Litt. p. 212. a.), ought always to be aimed at.

Whether notice should specify a place of payment.

It has been recommended, that, in giving notice to pay off mortgage-money, the place as well as the time of payment should be specified. 2 Cov. Pow. Mortg. 934. The Editor, however, is not aware of any authority for the doctrine that a creditor is bound to attend at a place of payment fixed by his debtor. If a place of payment be appointed in the notice, it is better to name the same place as is fixed in the proviso for redemption; for though it does not follow necessarily that the payment in pursuance of notice after forfeiture is to be made at the same place as if it had been made in performance of the proviso, (see 2 Eq. Ca. Ab. 609, pl. 34; 2 Cas. & Op. 52), yet probably a mortgagee would not be allowed to object to a place of payment that had been previously appointed by himself.

(*e*) And it seems proper to add—

"And so that nothing herein contained shall preclude the said [*trustee for sale*], his heirs or assigns, if he or they shall think fit, from disposing of the said last-mentioned hereditaments, subject to the said mortgage debt."

(*f*) "Subject as aforesaid,"

IN TRUST FOR SALE TO SECOND MORTGAGEE.

And after all the aforesaid principal and interest monies, costs, and expenses shall be wholly paid and satisfied, then, *In trust*, to pay over the residue or surplus of the said trust monies, to arise by the means aforesaid, unto the said [*mortgagor*], his heirs, executors, administrators, or assigns, for his and their own benefit. And the said [*mortgagor*] doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said [*mortgagees*], their executors, administrators, and assigns, that he the said [*mortgagor*], his heirs, executors, or administrators, shall and will well and truly pay, or cause to be paid, unto the said [*mortgagees*], their executors, administrators, or assigns, the aforesaid sum of —— pounds, and interest, in the instalments or shares, and on or at the days or times, hereinbefore for that purpose mentioned, without any deduction or abatement whatsoever, according to the true intent of these presents. And the said [*mortgagor*] doth, for himself, his heirs, executors, and administrators, covenant and agree with the said [*trustee for sale*], his heirs and assigns, by these presents, in manner following, that is to say, that he the said [*mortgagor*] hath in himself good right and full power to appoint, release, and convey all the messuages, lands, and other hereditaments hereinbefore expressed to be hereby appointed and released, with their appurtenances, unto and to the use of the said [*trustee for sale*], his heirs or assigns, (subject to the principal sum hereinbefore mentioned to be secured on the several messuages and hereditaments hereinbefore secondly described, and the interest for the same), for the purposes and in manner aforesaid, according to the true intent of these presents: *And also*, that, if default shall be made in payment of the said sum of —— pounds, or the interest, or any instalment or share thereof, contrary to the aforesaid trusts and agreement for payment of the same, or if the said first mortgage debt or principal sum of —— pounds and interest shall be called in and not forthwith discharged as aforesaid; then, and in any such case, but not otherwise, it shall be lawful for the said [*trustee for sale*], his heirs and assigns, at any time or times thereafter, into and upon all and every the messuages, lands, and other hereditaments hereby appointed and released, or intended

And to pay the residue, if any, to the mortgagor.

Covenant by mortgagor to pay debt.

Also with trustee for title.

For quiet enjoyment after default.

so to be, or any part thereof, to enter, and the same thenceforth peaceably and quietly to hold, occupy, and enjoy, and to receive and take the rents and profits thereof, upon the trusts, and for the intents and purposes hereinbefore declared, without any interruption by the said [*mortgagor*], his heirs or assigns, or any person or persons whomsoever having or claiming, or hereafter to have or claim any lawful or equitable estate, right, title, or interest, in, to, or out of the same messuage, lands, and other hereditaments, or any of them, except the said [*prior mortgagee*], his executors, administrators, or assigns, in respect of his aforesaid mortgage debt and security; *And* that free and clear [or freely and clearly acquitted, exonerated, and discharged, or otherwise, by the said [*mortgagor*], his heirs, executors, or administrators, saved and kept harmless and indemnified] of, from, and against all [former and other gifts, grants, bargains, sales, jointures, dowers, mortgages, uses, wills, entails, statutes, judgments, recognizances, executions, rents, sums of money, forfeitures, reentries, and all other estates, titles, troubles], charges and incumbrances whatsoever, other than and except the said mortgage debt hereinbefore mentioned to be secured on the several messuages and hereditaments hereinbefore secondly described, and the interest thereon: *And moreover,* that he the said [*mortgagor*] and his heirs, and all and every other persons and person whatsoever having or claiming or to claim any estate, right, title, trust, charge, or interest, of, in, or to the messuages, lands, and other hereditaments hereby appointed and released, or intended so to be, or any part thereof, [except the said [*prior mortgagee*], his executors, administrators, or assigns, in respect and during the continuance of his aforesaid mortgage debt and security], shall and will at all times hereafter, upon every request of the said [*trustee for sale*], his heirs or assigns, or of any person or persons beneficially interested in the security hereby made or intended so to be, but at the proper costs and charges of him the said [*mortgagor*], his heirs, executors, or administrators, until the said hereditaments shall be sold and conveyed under the trusts hereinbefore contained, and afterwards at the costs and charges of the purchaser or purchasers thereof, his, her, or their heirs or assigns, make, do, and execute,

IN TRUST FOR SALE TO SECOND MORTGAGEE.

And for further assurance.

IN TRUST FOR SALE TO SECOND MORTGAGEE.

or cause to be made, done, and executed, all such further and other acts, deeds, matters, conveyances, and assurances in the law whatsoever, for the further [better, and more perfectly conveying and] assuring all the messuages, lands, and other hereditaments hereby appointed and released, or intended so to be, with their appurtenances, unto and to the use of the said [*trustee for sale*], his heirs and assigns, in the manner and for the purposes aforesaid; (But as to the said messuages and other hereditaments hereinbefore secondly described, subject to the said mortgage debt of three hundred pounds and the interest for the same), as by the said [*trustee for sale*], his heirs or assigns, or any person or persons interested as aforesaid, or any of them, or his, their, or any of their counsel in the law, shall be reasonably devised or advised and required. IN WITNESS, &c.

TO SECURE UNPAID RESIDUE OF PURCHASE MONEY.

ASSIGNMENT *of Leasholds to* TRUSTEES *for* SALE, *to secure to a* VENDOR *Part of the* PURCHASE MONEY *remaining unpaid* (*a*); *Vendor's* COVENANTS *for* TITLE, *&c.*

Parties.

THIS INDENTURE, made &c., BETWEEN [*vendor*], of &c., of the first part; [*purchasers*], of &c., of the se-

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As to mortgages to vendors.

(*a*) Where part of the purchase money of an estate remains on mortgage, there are two modes of carrying the arrangement into effect. One is, by blending the mortgage and conveyance in one instrument, as in the precedent in the text; the other, by making the vendor convey to the purchaser for the whole consideration money, and the purchaser, by a separate deed, convey back to the vendor by way of mortgage for the unpaid portion of the purchase money, treating it as a loan in the ordinary way; and this is the more common mode, though the former is sometimes adopted to avoid expense, and has the additional advantage, that it prevents the mortgaged estate from becoming liable to any incumbrances affecting the purchaser, which, where the lands are freehold, and there is reason to suspect specialty *crown debts*, is an important consideration. See *Rex* v. *Lamb*, M'Clel. 402; *S. C.* 13 Price, 649, stated *post*, Vol. 7, p. 388. Where the purchase and mortgage are effected by a single deed, it should be stamped with *ad valorem* duties for the whole purchase and mortgage monies.

cond part; and [*trustees for sale*], of &c., of the third part. WHEREAS *(recite letters patent and lease granted to vendor)*. AND WHEREAS the said [*purchasers*] have contracted with the said [*vendor*] for the absolute purchase of the said leasehold premises for the residue of the said several terms of —— years and —— years, at or for the price or sum of twelve thousand pounds, to be paid or secured to be paid as follows, (that is to say), the sum of four thousand pounds, part thereof, to be paid at the time of the execution of the assignment of the said purchased premises, and the sum of eight thousand pounds, residue thereof, with interest for the same in the meantime, to be secured to the said [*vendor*], his executors, administrators, or assigns, in manner hereinafter mentioned. AND WHEREAS, in pursuance of the said agreement on the part of the said [*purchasers*], they the said [*purchasers*] have this day paid the sum of four thousand pounds of lawful money of Great Britain and Ireland to the said [*vendor*]. NOW THIS INDENTURE WITNESSETH, that, in further performance of the said agreement on the part of the said [*purchasers*], and in consideration of the assignment hereinafter contained, They the said [*purchasers*] do for themselves, their heirs, executors, and administrators, and each of them doth for himself, his heirs, executors, and administrators, covenant and agree with the said [*vendor*], his executors and administrators by these presents, That they the said [*purchasers*] or one of them, their or one of their heirs, executors, or administrators, will pay or cause to be paid unto the said [*vendor*], his executors, administrators, or assigns, the sum of eight thousand pounds of lawful money of Great Britain and Ireland, with interest for the same after the rate of five pounds for every hundred pounds by the year, to be computed from the day of the date of these presents, in the parts, shares, and proportions, and on or at the days or times hereinafter mentioned, (that is to say), the sum of four thousand pounds, part thereof, with interest for the whole of the said sum of eight thousand pounds, on the —— day of —— now next ensuing; And the further sum of four thousand pounds, residue of the said sum of eight thousand pounds, on the —— day of ——, which will be in the year of our Lord ——, with interest for the same

TO SECURE UNPAID RESIDUE OF PURCHASE MONEY.

Recital of agreement for purchase and security.

That part of purchase money has been paid.

Testatum.

Joint and several covenants for payment of unpaid purchase money.

TO SECURE UNPAID RESIDUE OF PURCHASE MONEY.

sum of four thousand pounds after the rate aforesaid in the meantime, from the said —— day of —— next, until the said —— day of ——, half-yearly, on the —— day of —— and the —— day of ——, in every year, without any deduction or abatement whatsoever [out of the said sum of eight thousand pounds or the interest thereon, or any part thereof respectively, for any present or future taxes or impositions, or any other matter, cause, or thing whatsoever]. AND THIS INDENTURE FURTHER WITNESSETH, that, in further performance of the said agreement, and in consideration of the said sum of four thousand pounds to the said [*vendor*] paid by the said [*purchasers*] as hereinbefore is mentioned; the receipt of which said sum of four thousand pounds, he the said [*vendor*] doth hereby acknowledge, and from the same and every part thereof doth acquit, release, and discharge the said [*purchasers*] respectively, and their respective executors, administrators, and assigns; *And also* in consideration of the said sum of eight thousand pounds hereby intended to be secured to the said [*vendor*], his executors, administrators, or assigns, (the said several sums of four thousand pounds and eight thousand pounds, making together the sum of twelve thousand pounds, the said purchase or consideration money as aforesaid); *And also* in consideration of the sum of ten shillings (*b*) of like lawful money paid by the said [*trustees for sale*] to the said [*vendor*], at or immediately before the sealing and delivery of these presents, (the receipt whereof is hereby acknowledged); *He* the said [*vendor*], at the request and by the direction of the said [*purchasers*], (testified by their severally executing these presents), *Hath* bargained, sold, assigned, transferred, and set over, And

Vendor, in consideration of monies paid and secured, assigns to trustee.

As to nominal pecuniary considerations.

(*b*) It may be observed here, once for all, in regard to nominal pecuniary considerations, that though the practice of inserting them is almost universal, wherever no substantial consideration moves from a grantee to a grantor, yet there is only one case in which a consideration of this nature is essential to the efficacy of the instrument, and that is, where the deed takes effect as a bargain and sale under the Statute of Uses; and even then the consideration need not be *pecuniary;* it is sufficient that it is *valuable*, as a pepper-corn rent. In bargains and sales for a year, it is usual to introduce both a nominal money consideration and a *reddendum*. (*Vide ante*, Vol. 3, p. 162).

by these presents *Doth* &c., unto the said [*trustees for sale*], their executors, administrators, and assigns, *(premises comprised in letters patent and lease)*, together with all erections and improvements thereon, AND all the estate, terms of years both in possession and reversion, and all the benefit, right of renewal, and benefit of covenants, and other right, title, interest, claim, and demand of him the said [*vendor*] by virtue of the said letters patent and indenture of lease respectively, or otherwise howsoever, Together with the said letters patent and indenture of lease, and all benefit thereof respectively. TO HAVE AND TO HOLD the said ——, and all and singular other the premises hereby assigned, or intended so to be, with their appurtenances, unto the said [*trustees*], their executors, administrators, and assigns, henceforth during all the residue and remainder now to come and unexpired of the said several terms of —— years and —— years, respectively granted by the hereinbefore recited letters patent and lease, and for all such further term or terms of years, or other estate or interest (if any) as the said [*vendor*] is entitled to therein; subject, nevertheless, to the payment of the rents and to the performance of the covenants in the said letters patent and indenture of lease respectively reserved and contained, and which are or ought henceforth on the tenant's or lessee's part to be paid and performed; And as to all and singular the premises hereinbefore assigned, or intended so to be, *Upon the trusts*, and for the intents and purposes hereinafter contained, (that is to say), IN TRUST for the said [*purchasers*], their executors, administrators, and assigns, until default shall be made by them in payment of the said sum of eight thousand pounds and interest, or any part thereof respectively, in the shares or at the times and in the manner hereinbefore appointed for the payment thereof respectively, or until default shall be made by the said [*purchasers*], their heirs, executors, or administrators, in the performance of the covenants hereinafter contained of them the said [*purchasers*], or some or one of them (*c*): AND UPON THIS FURTHER TRUST, that if

TO SECURE UNPAID RESIDUE OF PURCHASE MONEY.

All the estate &c.

Habendum.

In trust for purchasers until default.

Upon further trust to assign upon payment.

(*c*) As the trustees, by taking an assignment of the letters patent and lease, render themselves liable to the rents and covenants, it is fair that the

TO SECURE UNPAID RESIDUE OF PURCHASE MONEY.

the said [*purchasers*], their heirs, executors, administrators, or assigns, shall pay or cause to be paid the said sum of eight thousand pounds and the interest thereon to the said [*vendor*], his executors, administrators, or assigns, in the shares, or at the times, and in the manner hereinbefore appointed for the payment thereof respectively, and shall duly and faithfully perform the covenants of them the said [*purchasers*] hereinafter contained; Then, and in that case, they the said [*trustees*], or the survivor of them, or the executors or administrators of such survivor, or their or his assigns, do and shall, immediately after such payment shall be so made as aforesaid, upon the request and at the costs and charges of the said [*purchasers*], their executors, administrators, or assigns, assign the said —— and other the premises hereby assigned, or intended so to be, with their appurtenances, unto the said [*purchasers*], their executors, administrators, or assigns, during all the residue which shall be then unexpired of the said several terms and interests respectively hereby assigned, or intended so to be, for their use and benefit. But if default shall be made by the said [*purchasers*], their executors, administrators, or assigns, in the payment of the said sum of eight thousand pounds and interest, or any part thereof respectively, at any one of the several days or times hereinbefore appointed for payment of the same respectively, or in performance of the covenants of the said [*purchasers*] hereinafter contained, or any or either of them; then, and in either of the said cases, and immediately thereupon, UPON TRUST that they the said [*trustees*], or the survivor of them, or the executors or administrators of such survivor, or their or his assigns, do and shall absolutely sell and dispose of the said —— and premises hereby assigned, or intended so to be, either together or in parcels, and either by public auction or by private contract, to any person or persons for such sum or sums of money as to the said [*trustees*], or the survivor of them, or the executors or administrators of such survivor, or their or his assigns, shall seem reasonable, with liberty, if they or he shall deem it expedient so to do, to buy in the said premises at

But in case of default of payment,

Upon trust to sell.

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trust for sale should be made exercisable in default of the purchasers paying and performing them, as they covenant to do. (*Vide post*, p. 460).

any auction or auctions, and resell the same at any future auction, or by private contract, without being answerable for any loss occasioned thereby; And do and shall, for the purpose of such sale or sales as aforesaid, enter into, make, and execute all such contracts, covenants, agreements, acts, deeds, assignments, and assurances in the law, as to them or him shall seem reasonable. AND *it is hereby agreed and declared between and by the parties to these presents,* [that all the said contracts, covenants, agreements, acts, deeds, assignments, and assurances shall be binding and conclusive on the said [*purchasers*], their executors, administrators, or assigns, although they shall not join therein or assent thereto; And] that the receipt or receipts in writing of the said [*trustees*], or the survivor of them, or the executors or administrators of such survivor, or their or his assigns, for the money arising from the sale of the said ——, or any part thereof, shall effectually discharge the person or persons to whom the same shall be given from being answerable or accountable for the [misapplication or non-application, or being anywise bound or concerned to see to the] application of the money therein expressed to be received; And that it shall not be necessary for any purchaser or purchasers under the said trusts to see that any such default shall have happened as aforesaid, or to inquire as to the necessity for, or expediency of, any such sale, nor shall he, she, or they be affected by express notice that the same is or are unnecessary and inexpedient. AND *it is hereby further agreed and declared between and by the parties to these presents,* that the said [*trustees*], their executors, administrators, and assigns, shall, by, with, and out of the money arising from the sale of the said —— hereby assigned, or intended so to be, and the rents and profits accruing therefrom, after the same shall have become saleable under the trusts aforesaid, in the first place, retain to and reimburse themselves the costs and expenses, if any, incurred in paying the rents and performing the covenants reserved and contained by and in the hereinbefore recited letters patent and lease respectively, as aforesaid, and also the costs and expenses attending the said sale or sales, or otherwise to be occasioned in or about the execution of the trusts hereby created, or any of them;

TO SECURE UNPAID RESIDUE OF PURCHASE MONEY.

Contracts to be binding on mortgagors.

Trustee's receipts to discharge purchasers.

Trusts of purchase money.

TO SECURE UNPAID RESIDUE OF PURCHASE MONEY.

and, in the next place, pay and discharge unto the said [*vendor*], his executors, administrators, or assigns, the said sum of eight thousand pounds, or such part thereof as shall then remain unpaid, and all interest which shall be due for the same (*d*); And do and shall pay the surplus or residue (if any) of the said trust monies, which shall remain unapplied to the purposes aforesaid, unto the said [*purchasers*], their executors, administrators, or assigns, for their proper use and benefit. And the said [*vendor*], for himself, his heirs, executors, and administrators, doth covenant and agree with the said [*trustees*], their executors, administrators, and assigns, by these presents, in manner following, (that is to say), That, for and notwithstanding any act, deed, default, matter, or thing whatsoever by him the said [*vendor*] done, committed, or executed, or knowingly or wittingly suffered to the contrary, the said recited letters patent, and the hereinbefore in part recited indenture of lease respectively, at the time of the sealing and delivery of these presents, are good and effectual leases and demises in the law of and for the said premises therein comprised; and the said terms of years thereby respectively granted as aforesaid, are not, nor is either of them, forfeited, merged, surrendered, determined, or otherwise become void or voidable; And that, for and notwithstanding any such act, deed, default, matter, or thing whatsoever as aforesaid, he the said [*vendor*] now hath in himself good right, full power, and lawful and absolute authority, to assign the premises hereby assigned, or expressed and intended so to be, with

Vendor covenants,

that, notwithstanding any act by him, letters patent and lease are valid.

And that he has power to assign.

As to trusts for the investment of purchase money.

(*d*) In annuity deeds, containing trusts for sale, it is usual to provide for the investment of the purchase money to answer the accruing payments of the annuity, (*vide ante*, Vol. 1, p. 552, 2nd ed.), and a like provision might seem to be requisite where the mortgage money is payable by instalments, as default might be made in payment of one of the instalments before the other was payable. In such a case, if the continuance of the money on the security were deemed to be beneficial to the mortgagee, he might require the insertion of a clause of this nature; but which is rarely done. The annuity clause might, if occasion required, be easily adapted to the case supposed; but, if the value of the property greatly exceeded the amount of the mortgage money, the clause should direct an adequate portion only of the monies arising from the sale to be invested.

the appurtenances thereunto belonging, unto the said [*trustees*], their executors, administrators, and assigns, for all the residue now unexpired of the said several terms of —— years and —— years, upon the trusts and in manner aforesaid, according to the true intent and meaning of these presents: *And that* it shall be lawful for the said [*trustees*], their executors, administrators, and assigns, from time to time and at all times hereafter, during the residue of the several terms aforesaid, peaceably and quietly to enter into and upon, and to have, hold, occupy, possess, and enjoy the premises hereby assigned, or intended so to be, with their appurtenances, and to receive and take the rents, issues, and profits thereof, and of every part thereof, upon the trusts hereinbefore declared, without any lawful interruption, claim, or demand whatsoever, of or by him the said [*vendor*], his executors or administors, or of or by any other person or persons lawfully or equitably claiming or to claim by, from, or under or in trust for him, them, or any of them: *And that* free and clear, and for ever discharged, or otherwise, by the said [*vendor*], his heirs, executors, or administrators, well and sufficiently defended, saved, and kept harmless and indemnified of, from, and against all estates, titles, charges, and incumbrances whatsoever, either already had, made, executed, occasioned, or suffered, or hereafter to be had, made, executed, occasioned, or suffered by the said [*vendor*], his executors or administrators, or by any person or persons lawfully or equitably claiming, or to claim, by, from, or under, or in trust for him or them: *And further*, that he the said [*vendor*], his executors and administrators, and every other person lawfully claiming any estate, right, title, interest, charge, property, claim, or demand whatsoever, either at law or in equity, of, in, to, or out of the said premises hereby assigned, or intended so to be, or any part thereof respectively, by, from, or under or in trust for him the said [*vendor*], or his executors or administrators, will, from time to time and at all times hereafter, during the residue of the said respective terms of ——— years and ——— years, upon every reasonable request, and at the proper costs and charges of the said [*trustees*], their executors, administrators, or assigns, make, do, and execute, or cause and procure to be

TO SECURE UNPAID RESIDUE OF PURCHASE MONEY.

For quiet enjoyment.

Free from incumbrances.

And for further assurance.

TO SECURE UNPAID RESIDUE OF PURCHASE MONEY.

made, done, and executed, all such further and other lawful and reasonable acts, deeds, assignments, and assurances in the law whatsoever, for the more effectually and absolutely assigning and assuring of the said premises hereby assigned, or intended so to be, unto the said [*trustees*], their executors, administrators, and assigns, for the residue which shall be then to come of the same several terms, or either of them, as by the said [*trustees*], their executors, administrators, or assigns, or their counsel in the law, shall be reasonably advised and required. AND the said [*purchasers*] do for themselves, their heirs, executors, administrators, and assigns, and each of them doth for himself, his heirs, executors, administrators, and assigns, covenant and agree with the said [*trustees*], their executors, administrators, and assigns, by these presents, that they the said [*purchasers*], their executors, administrators, or assigns, shall and will, from time to time, during so long as any sum of money shall be owing on the security intended to be hereby made, insure, and keep insured, the said —— erections and buildings from and against all losses to be occasioned by fire, in the names of them the said [*trustees*], their executors, administrators, or assigns, in the —— Office, or some other office or offices for insurance against fire in London or Westminster, in the sum of —— pounds at the least: and shall and will, from time to time, deliver to the said [*vendor*], his executors, administrators, or assigns, or to the said [*trustees*], their executors, administrators, or assigns, the policy or policies of such insurance or insurances, and will, from time to time, within seven days after the annual premium and other expenses shall become due in respect of such insurances, pay the same, and, if thereunto requested by the said [*vendor*], his executors, administrators, or assigns, or by the said [*trustees*], their executors, administrators, or assigns, deliver to him or them the receipts for such premium and expenses; *And further*, that in case the said [*purchasers*], their executors, administrators, or assigns, shall, at any time or times hereafter, fail or neglect to keep so insured the said ——, or to deliver such policy or policies, receipt or receipts, according to the true intent and meaning of the covenant hereinbefore contained, it shall be lawful for the said [*vendor*], his executors, administrators,

Joint and several covenant by purchasers.

To insure buildings from damage by fire.

And in default, that vendor may insure in the names of trustees.

or assigns, from time to time, during so long time as any money shall be owing by virtue of these presents, to insure and keep insured the same premises, in the names of the said [*trustees*], their executors, administrators, or assigns, from fire, in any office or offices of insurance in London or Westminster, in any sum or sums of money not exceeding in the whole the said sum of —— pounds; And that they the said [*purchasers*], their executors or administrators, shall and will, within the space or period of —— days after payment of any sum or sums of money for insuring or keeping insured the said premises, as aforesaid, pay the same to the said [*vendor*], his executors, administrators, or assigns, with interest thereon, after the rate aforesaid, from the time of his or their advancing the same, and that the said premises shall stand and be charged therewith, and be a security for the repayment thereof unto the said [*vendor*], his executors, administrators, and assigns; And the same shall accordingly be raised and paid in the same manner as hereinbefore is expressed with respect to the said sum of eight thousand pounds, and the interest thereon: *And also* that they the said [*purchasers*], their executors, administrators or assigns, shall and will, at all times during so long as they shall be in the possession or receipt of the rents and profits of the said —— and premises hereby assigned, or intended so to be, under the trusts hereinbefore contained, pay the rents reserved and made payable in and by the said several hereinbefore recited letters patent, and indenture of lease respectively, as aforesaid, and perform all the covenants and agreements therein respectively contained, on the part of the tenant or lessee from henceforth to be performed; *And* from the same rents, covenants, and agreements respectively, and all costs and expenses on acconnt of any breach, neglect, or default of or in payment or performance thereof respectively, as aforesaid, shall and will keep indemnified the said [*trustees*], their heirs, executors, and administrators, and their and every of their lands and tenements, goods and chattels, respectively.—(*Power to appoint new trustees, ut ante, Vol.* 4, p. 303.) IN WITNESS, &c.

TO SECURE UNPAID RESIDUE OF PURCHASE MONEY.

That purchasers will repay the sums so expended, with interest.

To pay rents, and perform covenants of letters patent and lease.

BY SURETY, WITH TRUST FOR SALE.

CONVEYANCE *in Fee, in* TRUST *for* SALE, *to secure the* BALANCE *for the Time being due to Mortgagees, (a Mercantile Firm), from the Mortgagor's Son, for Goods to be supplied to him upon Credit, (for which the Deeds of the Estate had been antecedently deposited).* JOINT *and* SEVERAL COVENANT *by* PRINCIPAL *and* SURETY. *Usual Provisions, adapted to the case of a Security by a Surety, for a floating Balance to a fluctuating Firm.*

Parties.

THIS INDENTURE, made &c., BETWEEN [*mortgagor*], of &c., of the first part; [*principal debtor*], of &c., of the second part; and [*two mortgagees*], of &c., Manchester warehousemen, of the third part. WHEREAS the said [*mortgagor*] is well and sufficiently seised of or entitled in fee-simple unto the lands and hereditaments hereinafter described, free from all incumbrances. AND WHEREAS the said [*mortgagees*], sometime since, at the solicitation and request of the said [*mortgagor*], agreed to supply her son, the said [*principal debtor*], with goods upon credit; and in consideration thereof the said [*mortgagor*] deposited with the said [*mortgagees*] the title deeds (*a*) relating to the said hereditaments to which she is en-

Recital that mortgagor is entitled in fee.

That mortgagees had agreed to supply principal debtor with goods upon credit.

That mortgagor had deposited deeds as a security.

As to deposit securities.

(*a*) A deposit of title deeds by the owner of an estate with his creditor, whether the object be to secure a debt antecedently due, or a sum of money advanced at the time, operates as a mortgage in equity, by virtue of which the depositary acquires, not merely the right of detaining the deeds until the debt is paid, but an equitable interest in the land itself; and a simple delivery of the deeds will have this operation, without any express agreement as to the object of the delivery. Thus, if A., owing B. 100*l.*, deposit with him the title deeds of his estate, without saying one word, this would amount to a valid mortgage in equity, as the Court would infer such to have been the purpose of the deposit, unless the contrary were shewn, from the relation of debtor and creditor subsisting between the

titled as aforesaid, for the purpose of securing any sum or sums of money (not exceeding the principal sum

BY SURETY, WITH TRUST FOR SALE.

parties. And it has been decided, that a deposit of copies of court roll has the same effect in regard to copyholds. *Ex parte Warner*, 19 Ves. 202; *S. C.* 1 Rose, 286.

Doctrine disapproved of.

The doctrine has been viewed with much disapprobation, as a direct infringement of the enactment of the Statute of Frauds, which declares that no interest in the lands shall be granted or created without a note in writing; and Lord *Eldon* scarcely ever adverted to it in the numerous instances in which he had occasion to apply the principle, without expressing his strong reprehension of it. 11 Ves. 403, 404; 14 Ves. 606; 2 Ves. & Bea. 83; 1 Rose, 269; Ib. 287, 299; 1 Mer. 9. It is observable, however, that in the late statute*, which was passed principally for the purpose of extending the provisions of the Statute of Frauds† to cases to which it had been judicially determined not to apply, the doctrine in question has remained untouched; which is the more remarkable, since it not only comprises an extensive class of cases in which parol evidence is admitted to affect important interests, and presenting, therefore, in a high degree, that temptation to perjury which it is the object of the Legislature to remove, but because the use of deposit securities is detrimental to the public revenue, by enabling parties to evade the stamp duty upon mortgages; especially since it has been held that an unstamped written agreement does not exclude oral evidence. *Hiern* v. *Mill*, 13 Ves. 114.

Depositary of deeds entitled to a sale in case of bankruptcy.

One of the first cases establishing the validity of mortgages by the deposit of deeds, was *Russel* v. *Russel*, 1 B. C. C. 269, where the lease having been pledged by a person who afterwards became bankrupt to the plaintiff, as a security for a sum of money lent to the bankrupt, the pledgee filed a bill for the sale of the estate, which was resisted by the assignees, on the ground that the plaintiff's claim was against the law of the land, for that it would be charging land without writing, which is against the 4th clause of the statute of frauds; but the Lords Commissioners decreed according to the prayer of the bill. Lord *Loughborough* observed, that it was a delivery of the title to the plaintiff for a valuable consideration. The Court had nothing to do but to supply the legal formalities. *Ashhurst*, Lord Commissioner, said, that it was open to explanation upon what terms the lease was delivered. An issue was directed to try whether the lease was deposited as a security for the sum advanced by the plaintiff to the bankrupt. The jury found in the affirmative; but the reporter adds, that he was informed that this cause came on afterwards, be-

* 9 Geo. 4, c. 14. See this act stated, *ante*, Vol. 1, p. 329 *a*, 2nd ed.

† 29 Car. 2, c. 3, ss. 1 & 3.

BY SURETY, WITH TRUST FOR SALE.

hereinafter mentioned) which might, from time to time, be owing from the said [*principal debtor*] to the said

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fore Lord *Thurlow*, on the equity reserved, when his Lordship ordered that the lease should be sold, and the plaintiff paid his money. So, in *Featherstone* v. *Fenwick*, May, 1784, 1 B. C. C. 270, n.; and *Harford* v. *Carpenter*, 7th and 8th of April, 1783, Ib., Lord *Thurlow* held that the deposit of deeds entitled the holder to have a mortgage, and to have his lien effectuated, although there was no special agreement to assign, *the deposit affording a presumption that such was the intent.* See also *Hankey* v. *Vernon*, 2 Cox, 10; *Ex parte Coming*, 9 Ves. 115; *Ex parte Haigh*, 11 Ves. 403; *Ex parte Mountfort*, 14 Ves. 606; *Monkhouse* v. Corporation of *Bedford*, 17 Ves. 380; *Casberd* v. *Ward*, 6 Price, 411; *S. C.* Dan. 239. In the last case, it was held that a deposit security was good against the Crown, provided the deposit was *bonâ fide* made before the depositor became a debtor to the Crown by record or specialty*. If an act of bankruptcy be committed by a mortgagor between the time of his depositing the title deeds and executing a regular mortgage, as the beneficial interest passed to the mortgagee by the deposit, the validity of the security is not affected.

Deposit good against the Crown.

Effect of deposit may be negatived by apparent intention.

But though a deposit of deeds without any express agreement will create an equitable mortgage, yet, if the circumstances under which they are left raise an inference that such was not the purpose of the party delivering them, the deposit will not have this effect.

Thus, where A. who was indebted to certain bankers for advances made on sugars, afterwards applied to them with the lease in question, requesting them to advance money on it, which they declined, but he left it with them without making any declaration of his reasons for so doing; the Court of Common Pleas was of opinion that this gave the bankers no lien upon the lease for their debt. *Lucas* v. *Dorrien*, 1 J. B. Moore, 29.

An oral agreement to deposit deeds without delivery creates no lien.

A parol agreement to deposit deeds (without an actual delivery) is inoperative to create any lien upon the property. And therefore, where certain bankers advanced a sum of money on the deposit of a lease, and afterwards advanced the borrower further sums to enable him to renew the lease, which renewed lease was, when obtained, to be delivered to them; it was held, that the debtor becoming bankrupt before the lease was given up by the lessor's solicitor, the petitioners had no claim upon it. *Ex parte Combe*, 4 Madd. 249. A delivery of the deeds to the wife of the depositor, to be held between him and the creditor, has been decided not to be a deposit so as to create a lien, the possession of the wife being, in the construction of law, the possession of the husband. *Ex parte Coming*, 9

Delivery to wife.

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* But the soundness of this decision has been questioned, as it contravenes the general doctrine that the Crown is not bound by equities.

[*mortgagees*], or either of them, or their or his partner or partners, upon the balance of accounts for the goods

BY SURETY, WITH TRUST FOR SALE.

Ves. 115. Lord *Eldon* expressed an opinion in this case, that a memorandum, charging lands in favour of a creditor, *and not delivered to him*, but retained by the debtor himself, was not sufficient to create an equitable mortgage.

Deposit with A. not extended to advances by B.

A delivery of deeds to one creditor cannot, it seems, be made by oral agreement to cover advances made by another; and therefore, where deeds were deposited with A. as a security for a sum of money advanced by him, with an agreement that it should also be a security in his hands for a sum of money advanced by B.; Lord *Eldon* held that B. had *no* claim; his Lordship observing, that the decisions had not gone the length of saying, that the mere deposit of a deed with one man should be evidence of his being a trustee for another. *It might be otherwise where the depositary had himself advanced nothing;* and if, therefore, there had been a concomitant advance on the part of the person so claiming to be *cestui que trust*, and a dealing with the estate connected with that advance, it might be considered as evidence that the depositary, advancing nothing, was a trustee. *Ex parte Whitbread*, 1 Rose, 299; *S. C.* 19 Ves. 215. See also *Ex parte Coming*, 9 Ves. 117.

The distinction here suggested is, it must be confessed, rather refined; for, if an inquiry be admissible whether the advance was made *wholly* by the depositary, or *wholly* by a third person, how can it consistently be excluded to shew that it was made *partly* by one and *partly* by the other? If the Court had said that the act of delivering the deeds was so essential in the constitution of a deposit security, as to confine the benefit of the deposit to the person into whose hands they were actually placed, (the consequence of which would be, that if it was found that *no* money was advanced by that person, no mortgage would be created), the principle would have rested upon a broad and solid ground; but to admit evidence in any case as to the *quo animo* of the deposit, so as to extend the benefit of it to a third person advancing the whole money, and to exclude such evidence in favour of a third person, because it appeared that the purpose of the deposit was, to a certain extent, for the benefit of the depositary himself, seems to establish a distinction without a difference. At all events, it is conceived that the principle of the case of *Ex parte Whitbread* would not apply, where the advances were made by the depositary, partly out of his own monies and partly out of the monies of another; for though he cannot hold the deeds to secure advances made by himself and another, he may, it is apprehended, hold them to secure advances made by *himself* on his own behalf and that of another.

The practical result of this view of the question is, that, as it has not

BY SURETY, WITH TRUST FOR SALE.

so to be furnished to him as aforesaid (*b*). And whereas, for the purpose of carrying more completely into effect

(*b*) If so intended, add,

"or on any other account."

been positively decided that a deposit of deeds with one person in trust even wholly for another is good, and inasmuch as it has been decided that such a deposit for the benefit of himself and another is *not* good, it is better to avoid all question, by placing the deeds in the hands of the person who is to take the beneficial interest in the security; and if the deposit is intended to operate for the benefit of any other person, this intention should be expressed in writing.

Deposit of deeds.

A person who has a partial ownership in an estate can of course only charge the lands by a deposit of the deeds to the extent of that ownership.

—by tenant for life.

Thus, if a tenant for life deposit the title deeds relating to the inheritance with a creditor, the estate for life only is charged. See *Williams* v. *Medlicott*, 6 Price, 495.

—by husband, of wife's mortgage.

By parity of reason, if a man deposit his wife's mortgage (over which he has, *jure mariti*, a power of disposition,) to secure a debt of his own, this will be good against the wife surviving, as an alienation *pro tanto*. *Bates* v. *Dandy*, 2 Atk. 207.

—by mortgagee.

And if a person, who is himself a mortgagee, deposit the deeds which he holds in that character with a third person, this will operate as a good equitable transfer of the mortgage, and, in the event of his bankruptcy, his assignees will be decreed to make a legal transfer accordingly. *Wallwyn* v. Assignees of *Shepherd*, 4 Ves. 119. So, if a deposit-creditor deliver over the deposited deeds to a creditor of his own, the latter will be entitled to hold them against the original depositor. *Ex parte Smith*, 1 Ves. & Bea. 518. But, in both these cases, the sub-depositary of course can only stand in the place of the original depositary, (*i. e.* the *mesne* creditor); and must therefore deliver up the deeds on payment of the amount for which they were originally deposited, though a larger sum be due to himself.

—by person having no interest.

If a person have no interest in deeds deposited with him, of course he can confer none; and therefore, where a person to whom deeds are delivered for a particular purpose, and not by way of lien, deposits them as a security with a third person, they may be recovered from such person by the owner, without paying the debt owing to his bailee. *Jackson* v. *Butler*, 2 Atk. 306.

In the application of the doctrine regarding deposit-securities, three questions have arisen, requiring particular consideration:—

1st. Whether the deposit of title deeds with a creditor, in order that a mortgage may be prepared, gives him an *immediate* lien.

the objects of the said security, it has been agreed by and between the said parties to these presents, that the said

BY SURETY, WITH TRUST FOR SALE.

2nd. Whether a deposit can be made by an oral agreement to extend to *future* advances.

3rd. Whether it is necessary that *all* the deeds should be deposited, and what is the effect of a delivery of some of the deeds to one creditor, and the rest to another.

1. According to some cases at least, a delivery of deeds in order that a mortgage might be prepared, does *not* operate as an immediate deposit-security.

Whether a delivery of the deeds in order to a mortgage being prepared, creates an immediate lien.

Thus, in the case of *Brander* v. *Boles*, Pre. Ch. 275, where A., being indebted to the defendant, proposed to make him a mortgage of his estate, to secure the money, and, in order thereunto, left with him the deeds to get the assignment drawn; he (defendant) carried the deeds to an attorney for that purpose, and he dying, the defendant carried them to a scrivener for the like purpose; but before the assignment was perfected, A. became bankrupt. The assignee brought the bill to have these deeds delivered up, and the Court decreed accordingly. The reporter adds, that no reason was given for the decree. The arguments of the counsel placed the question on very different grounds from that on which it now stands.

Cases in support of the negative.

So in *Brizeck* v. *Manners*, 9 Mod. 284, Lord *Hardwicke* seems to have been of opinion, that the delivery of deeds to an attorney, with instructions (which it seems were in writing though not signed), to prepare a mortgage, created no charge upon the lands; his Lordship being of opinion, that a writing was necessary for this purpose. Again, in *Ex parte Bulteel*, 2 Cox, 243, where A., being indebted to B. & Co., bankers, they pressed for a real security, which A. agreed to give, and sent the title deeds in question to the bankers, who delivered them to an attorney, with instructions to prepare a security; before it was executed A. became bankrupt; Lord *Thurlow* said, " that this was a csae which did not come within the rule which has been established in this Court, viz. that the deposit of title deeds as a security for money, shall be taken as a mortgage; for that, here, the deeds were not deposited expressly as a pledge for securing any particular sum, but were delivered to an attorney for the purpose of enabling him to prepare a security which was to be afterwards executed, but the bankruptcy intervening, prevented that transaction being effected." So, in *Norris* v. *Wilkinson*, 12 Ves. 192, a debtor delivered title deeds to the attorney of his creditor, for the purpose of preparing a mortgage, and with the express understanding that the attorney should give them up to the creditor with the mortgage. The deeds were prepared but never executed. The question was, whether this amounted to an equitable mortgage? Sir *W. Grant*, M. R., held, that it did not. " In

BY SURETY, WITH TRUST FOR SALE.

Testatum.

[*mortgagor*] shall execute to the said [*mortgagees*] the conveyance and assurance hereinafter contained. NOW THIS

all the cases that have been referred to," said his Honor, "the deeds were delivered by way of deposit. Such deposit was indeed held to imply an obligation to execute a legal conveyance, whenever it should be required; *but the primary intention was to execute an immediate pledge,* with an implied engagement to do all that might be necessary to render the pledge effectual for its purpose. But here there was no intention to put the deeds into pledge. That was not the thing which any of the parties had in contemplation. All that is alleged is, that W., the mortgagor, had undertaken to execute a mortgage, when a mortgage should be prepared; and it is admitted, that the delivery of the deeds was to be made only a step towards its preparation." A similar decision was made in the case of The *King* v. *Benson,* cited 6 Price, 467, where it was found by an inquisition, that the defendant had placed certain title deeds in the hands of H., as attorney for T. & Co., to enable him to prepare a security for a debt then due, and for monies thereafter to become due to T. & Co., and that they still remained in his hands for this purpose, but the defendant had not executed any security. Lord Chief Baron *Richards* said, "that this being the case, it was not an equitable mortgage, and that had been settled in the case of *Norris* v. *Wilkinson.*"

Result of preceding cases.

The preceding cases, it will be perceived, all concur in supporting the proposition, that the delivery of deeds to a creditor or his attorney for the purpose of preparing a mortgage, gives him (the creditor) no immediate interest as an equitable incumbrancer. But this doctrine, apparently so well fortified by authority, stands directly opposed to the decisions of two eminent Judges, one of them made at a very recent period. The first of these cases is *Edge* v. *Worthington,* 1 Cox, 211, where W., the bankrupt, being pressed for payment of a legacy due to E., the plaintiff, from him as executor, promised her a security on his real estate, and afterwards, being attended by her solicitor, agreed to give her a mortgage on a certain house, and to send the title-deeds to the attorney to enable him to prepare it. The deeds were sent, and the mortgage prepared and executed; but, before its execution, W. had, it was contended, committed an act of bankruptcy. Sir *L. Kenyon,* M. R., held that this was a valid mortgage from the time of the deposit. "It has been supposed," said his Honor, "that the present case falls short of the decided cases; but it seems to me to be a stronger case. The circumstance of the deeds being deposited, leaves to the Court to infer the agreement, or to admit parol evidence of the actual agreement. Here the parol evidence proves the actual agreement. C., the solicitor, had from time to time applied for a mortgage. On the 9th of April his proposal was acceded to, and the creditor pro-

Delivery of deeds, for the purpose of having a regular mortgage prepared, held *not* to create an immediate lien.

INDENTURE WITNESSETH, that, in pursuance of the said recited agreement, and in consideration of the pre- BY SURETY, WITH TRUST FOR SALE.

mised to make him a mortgage, and to send the deeds to the attorney for that purpose: when the deeds were sent, the agreement was so far performed; and they could not be obtained back, but on the payment of the money." The other case alluded to is *Ex parte Bruce*, 1 Rose, 374, where a petition for a sale was resisted by the assignees of the depositor who had become bankrupt, on the ground that the deeds had been delivered to him, not as the security, but in order that a legal mortgage might be prepared. Lord *Eldon* said, "the principle of equitable mortgage is, that the deposit of the deeds is evidence of the agreement; *but if they are deposited for the express purpose of preparing the security of a legal mortgage, is not that stronger than an implied intention?*"

Remarks upon the two conflicting classes of cases.

It must be confessed, that these decisions place the question in a very unsatisfactory state of uncertainty—Of the two first cases, *Brander* v. *Boles*, and *Brizeck* v. *Manners*, it may be observed, that they were decided at a time when the doctrine of equitable mortgages by deposits of deeds was by no means so well settled as it now is; but the same observation does not apply to the three subsequent decisions of Lord *Thurlow*, Sir *W. Grant*, and Lord C. B. *Richards*, all tending to support a distinction which we have seen was so unequivocally negatived by Lord *Kenyon* and Lord *Eldon*. Upon future Judges will devolve the embarrassing task of deciding upon the preponderance of these conflicting authorities. The aversion which Lord *Eldon* has ever expressed towards the general doctrine, makes it the more extraordinary that his Lordship should, in *Ex parte Bruce*, have so unhesitatingly come to a determination extending it, in opposition to the more numerous and recent decisions upon the point, particularly as his conclusion does not completely accord with the principle of a decision of his Lordship on another occasion; for in the case of *Ex parte Pearce*, Buck, 525, stated *post*, p. 471; we find his Lordship stating, as one of the grounds of his determination against the lien of a creditor, with whom *part* only of the title deeds had been left, (and to whom it was intended that a formal security should be executed), *that it was not the intention that he should have a mortgage till an actual one was executed;* and his Lordship, in *Ex parte Hooper*, 1 Mer. 9, *post*, p. 470, (where, however, the question was somewhat different), alleged, as the reason for his decision, that the contract was "a contract for *conveyance*, and not for *deposit*."

Whether deposit-securities can be made to extend to future advances.

2. The next point to be considered, in regard to deposits of title deeds, is, whether they can be made, by parol agreement, to cover future advances.

The affirmative seems to have been assumed in *Ex parte Mountfort*, 14

BY SURETY, WITH TRUST FOR SALE.

mises, and also in consideration of 10*s.* &c., the said [*mortgagor*] *hath* granted, bargained, sold, released, and con-

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Mortgagor grants to mortgagee.

Ves. 606, where the question was, whether the security was not *confined* to the future debt, excluding the debt actually due; and Lord *Eldon* directed the Commissioners (it being a case of bankruptcy) to inquire into the fact, and that the produce of the sale should be applied accordingly.

In *Ex parte Langston*, 17 Ves. 227; *S. C.* 1 Rose, 26, it appeared that the petitioners, A. & Co., who were bankers, had advanced certain monies to E. and J. K., and, having promised to advance more, the leases of certain warehouses belonging to them were delivered to the petitioners, as a security for the advances which they might make on account of E. and J. K. That they advanced several sums of money on the faith of this security. That a few days afterwards, E. K. (in whom, as survivor, the leasehold premises were then vested,) signed a memorandum, stating that the deeds were deposited with A. & Co. as a security for the sums they had advanced, and charging the premises therewith, and agreeing to make such further security as A. & Co. should require. On the day on which this agreement was signed, E. K. committed an act of bankruptcy. The question was, whether A. & Co. were entitled to have the whole of the sums advanced by them paid out of the produce of the sale of the premises:—Lord *Eldon* decided in the affirmative. His Lordship said, that, as the Court would infer from the deposit that the money then advanced should be charged as if there was a written agreement, *there was no doubt that if it was made out by oath uncontradicted, additional advances would also be charged;* and his Lordship being of opinion that this was sufficiently proved, made an order according to the prayer of the petition.

Lord *Eldon* appears to have grounded his decision wholly on the parol evidence, independently of the written memorandum.

Deposit-security held to extend to future advances.

So, in *Ex parte Whitbread*, 19 Ves. 209, where the petitioner, W., claimed a lien as an equitable mortgagee of the lease of a public-house, which was deposited with him in 1808, as a collateral security for 1000*l.* lent to the lessee on his promissory note, *and a subsequent advance of* 100*l. in* 1810. Lord *Eldon*, after some hesitation, admitted the claim in respect of the subsequent advance, his Lordship observing,—"When it was determined that an actual deposit was to have the legal effect of an agreement in writing, it was for the money then due, and no more, *unless the parol agreement was also for future sums.* If the original bargain did not look to future advances, no subsequent advance can be a charge, unless the subsequent transaction is equivalent to the original transaction. If it is equivalent to a re-delivery of the deed, receiving it back as a security for both sums, that will do, as it cannot depend upon that mere form; but I shall require them to swear expressly, that when the sum of 100*l.* was advanced, it was upon the security of the deposit."

firmed, and by these presents *doth* grant, &c., unto the said [*mortgagees*], and their heirs, (in the actual possession, BY SURETY, WITH TRUST FOR SALE.

The result of the cases, therefore, seems to be, that, though it is to be inferred that a deposit of deeds is confined to the debt then due, in the absence of all evidence on the subject, yet, if the creditor can shew, that, at the time of the deposit, or of the subsequent advance, it was stipulated that the security should cover the future advances, his lien will extend to the sum so advanced, without any formal restoration and re-delivery of the deeds. And the circumstance of the deposit of the deeds being accompanied by a written memorandum, declaring it to be made to secure an existing debt, does not exclude parol evidence extending it to future advances. This position seems to be warranted by the case of *Ex parte Kensington*, 2 Ves. & Bea. 79, though the circumstances were different. There a deposit was made by A. of title deeds with certain bankers, with a memorandum, declaring it to be made as a security for any cash tranactions he might have with their house. The question was, whether the security extended to the firm after a change of partners? Lord *Eldon* thought, that the written memorandum did not have that operation: but his Lordship said—"My opinion, however, is, that if upon the affidavit and examination (before the Commissioners) taken together, aided by the extreme probability of the intention, I can collect that what was originally deposited for one purpose, should he held as deposited also for the other, with reference to the demand of the subsequent partners, *that, though by parol, would be sufficient within the cases.*" But the rule extending deposit securities to future advances upon oral agreements, does not apply to creditors having *legal* mortgages; and therefore, in the case of *Ex parte Hooper*, 1 Mer. 9, Lord *Eldon* (who expressed his dissatisfaction that he had gone so far, and his determination not to go farther, in admitting parol evidence in the cases under consideration,) held, that the assignee of a mortgagee (who had a regular mortgage and assignment) had no claim upon the mortgaged property for a farther advance made to the mortgagors, on a parol engagement; that it should be tacked to the original mortgage; and that, so soon as a new lease could be obtained, a mortgage security should be executed; but which was not done. "In the present case," his Lordship observed, "*the legal estate has been assigned by way of mortgage.* The mortgagee is not entitled to say, I hold this conveyance as a deposit, because the contract under which he holds it is a contract for conveyance only, and not for deposit." See also *Landerzee* v. *Willis*, 3 B. C. C. 21.

Result of the cases.

Written memorandum does not exclude parol testimony extending deposit.

But *contra*, where mortgagee has the legal estate.

3. The other question to be considered in regard to deposit-securities, is, whether it is necessary that *all* the deeds should be deposited. This was referred to as an undecided point by Lord *Eldon*, in *Ex parte Wetherell*, 11 Ves. 401, where there was an agreement for a security on the

Whether it is necessary that *all* the deeds should be deposited.

BY SURETY, WITH TRUST FOR SALE.

&c. *ut ante*, p. 246); All, &c. (*Describe parcels, general words, ut ante*, p. 246; *and all the estate, &c., and all deeds,*

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whole estate, but the deeds deposited related to a moiety only; his Lordship, however, being of opinion that the effect of a memorandum which had been signed by the depositor, was to charge the entirety, the point did not call for adjudication. It was more directly raised, however, in the case of *Ex parte Pearce*, Buck, 525, accompanied by the additional circumstance of difficulty, that part of the deeds had been deposited with one creditor, and part with another. The circumstances were as follow:—A., being indebted to P., promised him a security, and sent him all the title deeds belonging to a certain estate, to enable him to prepare a mortgage, *except the immediate conveyance to himself in fee*, which he retained, and afterwards deposited with R., another creditor, as a security, and promised to send him the other title deeds. A. then became bankrupt; P. and R. now joined in a petition for the usual order for sale. Lord *Eldon* said it was a case of great difficulty. "The question is," said his Lordship, "whether these two creditors are to be considered as equitable mortgagees by force of their respective deposits; and if they are, which of them is to have the preference. Suppose the deeds had been divided amongst twenty different creditors, would each of them have been equitable mortgagees, or could they altogether have formed one mortgagee?" After further argument, his Lordship was of opinion, that neither the one nor the other of the petitioners had an equitable mortgage; observing, how far the assignees could get the deeds from them was another matter. It was enough to say, that it was not the intention of the one that he should have a mortgage till an actual one was executed to him, and that the other was not to have an equitable mortgage till he got possession of the whole of the deeds.

Deposit of part of the title deeds with several creditors inoperative to create a mortgage as to both.

General remark.

A cursory glance at the numerous preceding cases, which have arisen in regard to deposit-securities, will strongly demonstrate the inexpediency of the practice of relying upon this species of security, which, however, has obtained to a considerable extent; and it is not a little surprising, that some large banking and mercantile firms are in the habit of invariably taking securities from their customers in this manner. The danger attending them is not entirely removed by taking a memorandum in writing*, though this is always to be preferred to a mere deposit. One advantage attending a memorandum is, that, in case the mortgagor becomes bankrupt, and the depositary applies to the Court for an order for a sale, he is allowed his costs out of the estate, however informal is the character of the writing,

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* *Vide* an observation, *ante*, p. 415.

&c. ut ante, p. 247): To HAVE AND TO HOLD the said ——, and all and singular other the premises hereby released, or intended so to be, with their appurtenances, unto the said [*mortgagees*], their heirs and assigns, To THE USE of them the said [*mortgagees*], their heirs and assigns, for ever, *Upon the trusts* hereinafter declared concerning the same; that is to say, UPON TRUST for securing the payment of any sum or sums of money, (not exceeding in the whole the principal sum hereinafter mentioned), in which the said [*principal debtor*] may, at any time, or from time to time hereafter, be indebted to the said [*mortgagees*] or either of them, their or either of their executors or administrators, either alone or together with any partner or partners in their said trade

BY SURETY, WITH TRUST FOR SALE.

Habendum.

To the use of mortgagees.

Upon trust for securing balance owing from principal to mortgagees.

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but not if he have a deposit of deeds without any writing. *Ex parte Brightwen*, 1 Swanst. 3; *S. C.* Buck, 148; *Ex parte Sikes*, Buck, 349; *Ex parte Trew*, 3 Madd. 372.

Equitable mortgages not being within Lord *Loughborough's* general order in bankruptcy, of the 8th March, 1794, (4 B. C. C. 548), the creditor cannot obtain a sale by application to the Commissioners, but must petition the Court for an order for sale; and if the equity of redemption is not in the bankrupt, the proceeding must be by bill. *Ex parte Topham*, 1 Madd. 38.

Whether equitable mortgagees applying for an order for sale, are entitled to rents.

A question has, in some cases, been raised, how far a creditor petitioning for a sale is entitled to the *mesne* rents of the property previously to the sale. In *Ex parte Bignold*, 2 Glynn & Jam. 273, the premises were in the occupation of the bankrupt at the time of the bankruptcy, and afterwards of his assignees, and valuable crops were growing thereon, which the assignees had begun to cut: the petitioner (*i. e.* the equitable mortgagee) prayed that he might be declared entitled to these crops growing upon the premises since the bankruptcy. The Vice-Chancellor held him to be entitled from the time of presenting his original petition for a sale, allowing the assignees the expense of cultivation since that period.

In another case, where an equitable mortgagee, who had obtained an order for sale, applied for an order to restrain the assignee from receiving rent, Lord *Eldon* said, he could find no precedent for allowing a creditor not in possession to obtain an order not only for the sale of the estate, but also to be allowed, in the meantime, the rent which should become due before the sale. The case, however, stood over, that the parties might produce a precedent; and, in the meantime, his Lordship resigned the great seal. *Ex parte Cleander*, 2 Glynn & Jam. 275.

BY SURETY, WITH TRUST FOR SALE.

or business, or the executors or administrators of such partner or partners, on the balance of accounts for goods sold and delivered by them or him, unto or for the use or on account of the said [*principal debtor*], or on any promissory note or notes, or bill or bills of exchange, made, drawn, indorsed, or accepted by the said [*principal debtor*], on account of such goods (*c*), clear of all deductions whatever. AND for that purpose, in case default shall be made in payment of the whole or any part of such sum or sums of money, within three calendar months after the same shall have become due and payable, Then, UPON TRUST, at any time or times thereafter, so long as any of the said sum or sums, or any part thereof, shall remain unpaid, without the necessity of any further consent or concurrence on the part of the said [*mortgagor*], her heirs or assigns, to make sale, and absolutely dispose of the said hereditaments and premises hereby released, or intended so to be, or any part or parts thereof, either together or in parcels, and either by public auction or private contract, for the best price or prices that can be reasonably gotten for the same, with liberty to buy in the same at any auction or auctions, if it shall be deemed expedient, without being answerable for any loss which may be occasioned thereby; and convey and assure the said hereditaments, when sold, unto the purchaser or purchasers thereof, his, her, or their heirs and assigns. AND UPON FURTHER TRUST, out of the rents and profits of the said hereditaments and premises, until the sale thereof, and also out of the monies which shall arise from any sale or sales to be made as aforesaid, in the first place, to retain or pay and satisfy all costs, charges, and expenses, incident to such sale or sales, and to the execution of these present trusts; And in the next place, to retain or pay and satisfy unto the said [*mortgagees*], or either of them, their or either of their executors, administrators, or assigns, either alone or together with such partner or partners as aforesaid, his or their executors or administrators, the

In default of payment, upon trust for sale.

Application of monies.

(*c*) If so intended, add—

"or on any other account whatsoever."

BY SURETY, WITH TRUST FOR SALE.

sum or sums (not exceeding the amount hereinafter mentioned), in which the said [*principal debtor*], his executors or administrators, shall be indebted to them or him on the balance of accounts, as aforesaid; and all costs, charges, and expenses sustained or incurred in or about any suit or suits at law or in equity, which shall be instituted for enforcing the payment of such sum or sums, or any part thereof: And in case, after retaining, or paying, or satisfying the said sum or sums, costs, charges, and expenses aforesaid, any residue or surplus of the money which shall be received by the said [*mortgagees*] or the survivor of them, their or his heirs, executors, administrators, or assigns, by virtue of the trusts aforesaid, shall remain in their or his hands, unapplied to any of the purposes aforesaid, THEN UPON TRUST, to pay such residue or surplus unto the said [*mortgagor*], her heirs, executors, administrators, or assigns, for her or their own use and benefit; But in case the whole of the sum or sums hereby secured, together with all such costs, charges, and expenses, (if any), as aforesaid, shall be paid or satisfied, either by the means aforesaid, or by any other means, before the whole or any part of the said hereditaments shall be sold under the trusts aforesaid, THEN UPON TRUST, at the request and costs of the said [*mortgagor*], her heirs or assigns, to reconvey the same, or so much thereof as shall remain unsold, unto the said [*mortgagor*], her heirs or assigns, free from all incumbrances created by the said [*mortgagees*], or either of them, their or either of their heirs or assigns, in the meantime; and upon or for no other trust, intent, or purpose whatsoever. PROVIDED ALWAYS, *and it is hereby further declared*, that the total amount of principal monies to be ultimately recoverable under or by virtue of the security hereby made, shall not exceed the sum of £——; and that such security shall not be considered as wholly or partially satisfied by the payment or liquidation, otherwise than by putting in force the same security, of any sum or sums of money which shall at any time, or from time to time, be due and owing from the said [*principal debtor*] on balance of such accounts as aforesaid, or as wholly satisfied by the payment or liquidation by means of such security of the entire ba-

Principal money not to exceed £——.

Security not to be satisfied by payment of monies by debtor.

BY SURETY, WITH TRUST FOR SALE.

lance which shall at any time be so due and owing, unless the same, either alone, or together with any sum or sums previously paid or liquidated, shall in like manner be equal to the total amount aforesaid, but that the said security shall extend to cover any sum or sums of money which shall, for the time being, constitute the balance due from the said [*principal debtor*], until principal monies to the full amount aforesaid shall have been actually recovered or satisfied by means of the security herein contained (*d*).

Receipt of survivor to be a discharge.

PROVIDED ALSO, *and it is hereby further declared*, that in case of the decease of either of them the said [*mortgagees*], the receipt of the survivor of them, and, after the decease of such survivor, the receipt or receipts of his executors or administrators, without the concurrence of the executors or administrators of such of them as shall first have departed this life, shall be an effectual discharge or effectual discharges for any sum or sums of money hereby intended to be secured, and shall exonerate the person or persons paying the same from all responsibility in respect of the application thereof; *And further*, that this present security shall not be in any manner prejudiced or affected by the death of either of them the said [*mortgagees*], or his retirement from the trade or business now carried on by them in copartnership as aforesaid, but shall continue in full force for the benefit of the surviving or continuing partner, in respect of any debt which shall become owing to him from the said [*principal debtor*] after such death or retirement, either alone or together with any partner or partners as aforesaid, any rule of law or equity to the contrary notwithstanding (*e*). PROVIDED ALSO, *and it is hereby further declared*, and the said [*mortgagor*] hereby expressly directs, that every receipt which shall be given by the said [*mortgagees*] or the survivor of them, his heirs, executors, or administrators, or their or his assigns, to the purchaser or purchasers of the said here-

Security not to be affected by the death or retirement of any member of the firm.

Receipt of mortgagee to discharge purchasers.

(*d*) This clause is introduced to exclude the rule adopted in *Kirby* v. Duke of *Marlborough*, 2 Mau. & Selw. 18, stated *ante*, Vol. 3, p. 240.

(*e*) This clause is inserted from abundant caution, to prevent the application of the doctrine discussed *ante*, Vol. 3, p. 281, *et seq.*

ditaments hereby released, or to any other person or persons paying to them or him any sum or sums of money in execution of the said trust, shall be an effectual discharge for the same; And that after taking such receipt, the said purchaser or purchasers, or other person or persons, shall not be obliged to see to the application of the same money, or any part thereof: And *it is hereby further declared*, that every sale which shall be made, and every conveyance which shall be executed by the said [*mortgagees*] or the survivor of them, or his heirs, or their or his assigns, shall be binding and conclusive on the said [*mortgagor*], her heirs and assigns; And that the purchaser or purchasers of the said premises shall not be obliged to inquire, whether any sale or sales is or are necessary or proper for any of the purposes hereinbefore expressed, nor be affected by express notice that the same is or are unnecessary and improper. And the said [*principal debtor*] and [*mortgagor*] do for themselves, their heirs, executors, and administrators, and each of them doth for himself and herself, his and her heirs, executors, and administrators, hereby covenant and agree with the said [*mortgagees*], their executors, administrators, and assigns, That the said [*principal debtor*] and [*mortgagor*] or one of them, their or one of their heirs, executors, or administrators, will pay or cause to be paid unto the said [*mortgagees*] or one of them, their or one of their executors, administrators, or assigns, such sum and sums of money (not exceeding the principal sum aforesaid), as may at any time, or from time to time hereafter, be due and owing from the said [*principal debtor*] to the said [*mortgagees*] or either of them, their or either of their executors, administrators, or assigns, either alone or jointly with any partner or partners as aforesaid, or the executors or administrators of such partner or partners as aforesaid, at the time or times and in the manner expressed for the payment of the same in the trust for sale hereinbefore contained, according to the true intent and meaning of these presents. Provided nevertheless, and it is hereby declared, that this present covenant shall not operate to restrict or limit the liability of the said [*principal debtor*], his executors or administrators, in respect of

BY SURETY, WITH TRUST FOR SALE.

Sales to be binding on mortgagor.

Joint and several covenants to pay mortgage-money.

Covenant not to be restrictive of principal debtor's liability.

BY SURETY, WITH TRUST FOR SALE.

any debt or debts which he or they may hereafter contract with the said [*mortgagees*], or either of them, their or either of their executors, administrators, or assigns, nor shall such covenant be pleaded by the said [*principal debtor*], his executors or administrators, in bar to any action of *assumpsit* or otherwise, that shall be brought for such debt or debts, it being the intention of the parties hereto, that the said [*principal debtor*], his executors and administrators, shall be liable to pay such debt or debts at the same time or times, according to the terms of the contract or contracts respecting the same, and in the same manner in all respects as if these presents had not been made, any rule of law or equity to the contrary notwithstanding. AND the said [*mortgagor*], for herself, her heirs, executors, and administrators, doth hereby covenant with the said [*mortgagees*], their heirs and assigns, that she the said [*mortgagor*] is now seised of, or well entitled to, a clear, rightful, absolute, and indefeasible estate of inheritance in fee simple in possession in the said hereditaments hereinbefore described, and hereby intended to be released; *And that* she the said [*mortgagor*] now hath in herself good right and absolute authority to assure the same unto and to the use of the said [*mortgagees*] their heirs and assigns, in manner aforesaid; *And also* that it shall be lawful for the said [*mortgagees*], their heirs and assigns, at all times for ever hereafter peaceably and quietly to enter into or upon, and hold and enjoy the said hereditaments hereby released, and to take the rents and profits of the same upon the trusts aforesaid, without any eviction, interruption, or denial, from or by any person or persons whomsoever; *And that* free and clear from all estates, rights, titles, charges, and incumbrances whatsoever, except the land tax henceforth to become due in respect of the said hereditaments; *And also* that the said [*mortgagor*], and her heirs, and every person whosoever having, or rightfully claiming or to claim, any estate, right, title, or interest, at law or in equity, in, or to, or out of the said hereditaments hereby released, or any part thereof, will or shall, at any time and from time to time, upon every reasonable request of the said [*mortgagees*], or the survivor of them, his executors or administrators,

Covenants by mortgagor.

That she is lawfully seised,

and has good right to convey.

For quiet enjoyment free from incumbrances,

except the land tax.

And for further assurance.

BY SURETY, WITH TRUST FOR SALE.

or their or his assigns, and at the costs and charges of the said [*mortgagor*], her heirs or assigns, until the said hereditaments shall be sold and conveyed under the trust for sale hereinbefore contained; and afterwards, at the costs and charges of the purchaser or purchasers thereof, his, her, or their heirs or assigns, make, do, acknowledge, levy, suffer, execute, and perfect every such lawful act, deed, conveyance, or assurance in the law whatsoever, either by fine, common recovery, release, confirmation, or otherwise howsoever, for more effectually or satisfactorily granting, releasing, confirming, or otherwise assuring the said hereditaments hereby intended to be released unto and to the use of the said [*mortgagees*], their heirs and assigns, as by their counsel in the law shall be advised and required. AND the said [*mortgagees*] do for themselves, their heirs, executors, and administrators, and each of them doth for himself, his heirs, executors, or administrators, hereby covenant with the said [*mortgagor*], her heirs and assigns, that they the said [*mortgagees*], their heirs or assigns, will not take possession of, or enter into the receipt of the rents and profits of the hereditaments hereby released, or proceed to a sale thereof, under the trust hereinbefore contained, until such default shall have been made by the said [*principal debtor*] and [*mortgagor*], or one of them, their or one of their heirs, executors, or administrators, in payment of the monies hereby intended to be secured, or some part thereof, as is hereinbefore mentioned or provided in and by the same trust for sale; but so, nevertheless, that this present covenant shall not affect any purchaser or purchasers under the said trust for sale, nor any person or persons claiming under such purchaser or purchasers. IN WITNESS, &c.

Covenant by mortgagees not to enter or sell until default.

BY TENANT FOR LIFE AND REMAINDER-MAN.

MORTGAGE *in* FEE, *by* TENANT *for* LIFE, *and* REMAINDER-MAN, *for securing* £300, *and Interest, subsisting Mortgage Debt being paid off out of the Money now advanced, and* TERM *of One Thousand Years vested in prior Mortgagee* ASSIGNED *in Trust to* ATTEND *the* INHERITANCE, &c., *for the Benefit of the present Mortgagee* (*a*). *(Variation where Mortgage Money is secured by* WARRANT *of* ATTORNEY).

Parties.

THIS INDENTURE, of four parts, made &c., BETWEEN [*mortgagor tenant for life*], of &c., and [*mortga-*

As to the mode of assigning terms to attend the inheritance.

(*a*) It is not advisable in general to assign a term by the same deed as that by which the inheritance on which it is to be attendant is conveyed; because, if the deed were produced in evidence on an ejectment brought by the owner of the fee, it would negative his title to recover, by shewing the legal estate to be in another. Where, however, the termor is a mortgagee who receives part of the money advanced by the person to whom the fee is conveyed, (as in the precedent in the text), he is generally made a party for the purpose of shewing the destination of the consideration money, which of course leads to a disclosure of the term vested in him, so that the object of a separate assignment would be defeated. But even where the mortgage is paid off by this means, the transaction is not *necessarily* disclosed on the face of the conveyance of the fee, for the consideration money may be therein treated as paid by the grantee to the grantor, and then, in the separate deed by which the term is assigned, the fact may be explained, that part, or the whole (as the case may be) of the consideration money alleged in the conveyance of the inheritance to be paid to the grantor, was actually paid to the termor by his direction, in satisfaction of his mortgage debt. This is sometimes done, where it is deemed to be of importance that the assignment of the term should not appear on the conveyance of the fee; but in a mortgage for so trivial a sum as that in the text, the additional expense consequent on assigning the term by a separate deed might be considered an objection to the plan.

gor remainder-man], of &c., of the first part; [*prior mortgagee*], of &c., of the second part; [*present mortga-* BY TENANT FOR LIFE AND REMAINDER-MAN.

The practice formerly adopted of introducing into purchase or mortgage deeds a declaration that all satisfied terms should attend the inheritance in trust for the purchaser or mortgagee, instead of assigning the term to a trustee for him, is now very generally and properly abandoned; inasmuch as such a declaration does not afford the same protection to a purchaser or mortgagee as an actual assignment, (*vide ante*, p. 417). The utility of attendant terms of years, as a protection against judgments, antecedent mortgages, dower, &c., has already been incidentally noticed. *Vide ante*, p. 417, and Vol. 1, p. 108, 2nd ed. The doctrine has been the subject of much learned research and discussion among text writers. *Vide* Harg. & Butl. Co. Litt. 208, n., 290. b. n.; Sugd. Vend. & Purch. 7th ed. 445; 2 Prest. Ab. 16; 3 Ib. 277; Cov. Pow. Mortg. 477, n.; Patch on Mortg. 299, 377.

Cases in which terms should be assigned.

Mr. Butler has propounded the following general rules, as explanatory of the cases in which purchasers and mortgagees should require an assignment of outstanding terms.

1st. "That wherever a term has been raised for securing the payment of money, as the assignment of it by the trustee for the person entitled to receive to a trustee for the person obliged to pay the money, is the best possible evidence of the payment of the money, it may be reasonably required as such.

2nd. "In case a term for years has been assigned to attend the inheritance, if, upon a purchase, all the deeds (as well originals as counterparts) by which the term was created or assigned are delivered to the purchaser, and he is satisfied that the trustee in whom it is there said to be vested has made no prior assignment of it, and that the vendor has not charged the estate with any intermediate incumbrance, it is difficult to say what possible use can be made of the term against him, or what good can be answered by requiring an assignment of it to a trustee of his own, unless it be to satisfy the requisitions of those to whom he may afterwards have occasion to mortgage or sell the estate.

3rd. "But if any of the deeds respecting the term are not delivered to the purchaser, *or if he is not satisfied of the trustee not having previously assigned it*, or of the vendor having made no intermediate incumbrance, it seems prudent to require an actual assignment of it to a trustee for him." Co. Litt. 290. These rules have been mentioned with approbation, and transcribed by Sir E. B. Sugden in his excellent Treatise on Vendors and Purchasers, (p. 401, 7th ed.), but there is an inaccuracy in them, which seems to have escaped notice. It will be observed, that an assignment of

BY TENANT FOR LIFE AND REMAINDER-MAN.

gee], of &c., of the third part; and [*trustee of term*], of &c., of the fourth part. WHEREAS, by indenture tripar-

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a term is recommended to be taken where the purchaser "is not satisfied of the trustee not having previously assigned" the term; whereas it is obvious, that, if the trustee has "previously assigned" it, his second assignment must be inoperative. It is *possible* that, in such a case, a person having the deeds relating to the term might, under some circumstances, prevail in equity against a person to whom it had been previously assigned, (*vide ante*, p. 417); but clearly he would derive no advantage from taking an assignment, unless, perhaps, as establishing more conclusively than could otherwise be done, a claim against the trustee for the fraud thus practised upon him. If an intended mortgagee had ground to suspect any improper dealing with the term on the part of the trustee, he would of course not accept the security. A *purchaser* previously bound by contract may be in the dilemma suggested.

Term excludes dower, though not assigned until the death of the husband.

One of the objects for which satisfied terms of years are frequently found to be useful, is, to protect against dower; in regard to which it may be noticed, that a term created previously to the inception of the right of dower will exclude it, though not actually assigned until such right has attached by the death of the husband.

Thus, if A., seised in fee, mortgage his lands to B. for a term of years, and then marry, (or, being married, his wife join by fine in the mortgage), and afterwards he mortgage the same lands in fee to C., and die, leaving his widow surviving him, the second mortgagee might exclude the dower of the widow, by taking an assignment after the death of A. of the term vested in B., the first mortgagee. See *Wynn* v. *Williams*, 5 Ves. 130; *Mole* v. *Smith*, Jacob, 490, stated *ante*, Vol. 1, p. 108, 2nd ed. But such an assignment must of course be made while the dower remains a *right* only, and would be inoperative to exclude the widow, after her dower had by judicial process been assigned to her by metes and bounds, by which means she had acquired an actual *estate* in the portion of the lands so assigned.

Doctrine of presuming surrenders of terms.

It is now settled, that a term of years is no protection againt crown debts; *King* v. *Smith*, Sugd. Vend. Append. 792, 7th ed.; and as a protection against other incumbrances, it is to be relied upon with caution where the term has not been recently assigned, since the late decisions of the Court of King's Bench, which go to establish the doctrine, that the non-user of a term by the parties beneficially entitled forms a ground for presuming its surrender. *Doe* d. *Putland* v. *Hilder*, 2 Barn. & Ald. 782; *S. C.* Sugd. Vend. 426, 7th ed. See a full discussion of this subject, *post*, Vol. 6, p 468.

tite, bearing date on or about the —— day of —— which was in the year 1784, and made between the said [*mortgagor tenant for life*], of the first part; the said [*mortgagor remainder-man*], eldest son of the said [*mortgagor tenant for life*], of the second part; and [*C— C—*], of &c., of the third part; *It was witnessed*, that, in consideration of the love and affection which the said [*mortgagor tenant for life*] had and bore for the said [*mortgagor remainder-man*], and for the other considerations therein expressed, *He* the said [*mortgagor tenant for life*] did covenant, grant, and agree to and with the said [*C— C—*], his heirs and assigns, that he the said [*mortgagor tenant for life*], his heirs and assigns, and all other persons who then stood, or should at any time thereafter stand seised of the therein and hereinafter mentioned hereditaments, should and would stand and be seised of the —— and hereditaments hereinafter described, and hereby released, or intended so to be, *To the use* of him the said [*mortgagor tenant for life*], and his assigns, for and during the term of his natural life, and, from and after his decease, then *To the use and behoof* of the said [*mortgagor remainder-man*], his heirs and assigns, for ever.

BY TENANT FOR LIFE AND REMAINDER-MAN.

Recital of settlement;

And whereas, by an indenture of demise or mortgage, bearing date on or about the —— day of ——, in the year ——, made between the said [*mortgagor tenant for life*] and [*mortgagor remainder-man*], of the one part; and the said [*prior mortgagee*], of the other part; the said [*mortgagors*], in consideration of the sum of 200*l.* to them or one of them paid, advanced, and lent by the said [*prior mortgagee*], did grant, bargain, sell, and demise unto the said [*prior mortgagee*], his executors, administrators, and assigns, the said —— and hereditaments hereinafter described, and hereby released, or intended so to be, *To hold* the same unto the said [*prior mortgagee*], his executors, administrators, and assigns, during the term of one thousand years; But subject nevertheless to a proviso therein contained, for redemption of the said premises, on payment by the said [*mortgagors*] or either of them, their or either of their assigns, or the heirs, executors, or administrators of the said [*mortgagor remainder-*

—of prior mortgage.

BY TENANT FOR LIFE AND REMAINDER-MAN.

man] unto the said [*prior mortgagee*], his executors, administrators, or assigns, of the said sum of 200*l.*, with interest for the same, at the times and in the manner therein mentioned: AND WHEREAS the said sum of 200*l.*, secured to the said [*prior mortgagee*] by the said indenture of demise or mortgage, was not paid to him at the time therein appointed for that purpose, by reason whereof the estate and interest of him the said [*prior mortgagee*], of and in the said —— and premises so thereby demised, became absolute in law for all the residue of the said term of one thousand years: AND WHEREAS there is now remaining due and owing unto the said [*prior mortgagee*], for principal and interest, upon or by virtue of the said recited security, the sum of 218*l.* 15*s.*, and no more, as he doth hereby acknowledge: AND WHEREAS the said [*mortgagors*], having occasion for the sum of 300*l.*, have requested the said [*present mortgagee*] to advance them the same, as well to enable them to pay off the said mortgage debt or sum of 218*l.* 15*s.* so due and owing unto the said [*prior mortgagee*] as aforesaid, as also to supply their other occasions: And the said [*present mortgagee*] hath accordingly agreed to advance them the said sum of 300*l.* at interest, upon having the same secured by a grant and conveyance of the premises comprised in the said recited indenture of demise in manner hereinafter expressed (*b*); and it hath been agreed that the residue of

—of default in payment of mortgage-money.

—of agreement for loan by present mortgagee.

(*b*) Add, if so intended—

"and by the several warrants of attorney to enter upon record judgment against the said [*mortgagors*]."

Judgment against each of several persons to be preferred to a joint judgment.

Where a debt is to be secured by a judgment against several persons, it is advisable to have a separate judgment against each, rather than a joint judgment against the whole; because a joint judgment survives as to the personalty, and therefore, in case of the death of either of the conusors, execution cannot be taken out against the goods of the deceased. See *Trethewy* v. *Ackland*, 2 Saund. 50 a. On the other hand, it does *not* survive as to the realty; and the consequence is, that a moiety of the lands of the surviving conusor or conusors alone cannot be taken by *elegit*, but a *scire facias* must be sued out against such survivor or survi-

the said mortgage term of one thousand years shall be assigned by the said [*prior mortgagee*] to the said [*trustee of term*] upon the trusts hereinafter declared (*c*). NOW, THEREFORE, THIS INDENTURE WIT- *Testatum.*

BY TENANT FOR LIFE AND REMAINDER-MAN.

vors, and *the heir and terre-tenants of the deceased conusor. Smarte* v. *Edsun*, 1 Lev. 30; *S. C.* Sir T. Raym. 26; *Lampton* v. *Collingwood*, 4 Mod. 315; and see 1 Salk. 320; Carth. 107; 2 Wms. Saund. 50, n. 4.

(*c*) "AND WHEREAS, in pursuance of the said agreement, each of them the said [*mortgagors*] hath executed a warrant of attorney, bearing even date with these presents, authorizing certain attornies therein respectively named, to enter upon record judgment against him in his Majesty's Court of King's Bench at Westminster, at the suit of the said [*present mortgagee*], for the sum of £——, and costs of suit; on which several warrants of attorney it is intended that judgment shall forthwith be entered up.

Recital of warrants of attorney to confess judgment.

FORM *of* WARRANT *of* ATTORNEY *to accompany* MORTGAGE.

WARRANT OF ATTORNEY TO ACCOMPANY MORTGAGE.

TO ——, and ——, Attornies of his Majesty's Court of ——, at Westminster, jointly and severally, or to any other Attorney of the same Court—

THESE are to authorize and empower you, the attornies above named, and each of you, or any other attorney of the said Court of ——, to appear for me [*mortgagor*], of &c., in the said Court, as of this present —— term, next —— term, or any subsequent term, and then and there to receive a declaration for me, in an action of debt against me, for the sum of £ ——, [*double the amount of the mortgage-money*], for money borrowed, at the suit of [*mortgagee*], of &c., his executors or administrators; And thereupon to confess the same action; and also to suffer judgment by *nil dicit*, or otherwise, to pass against me in the same action, and to be forthwith entered up against me of record in the same Court, for the said sum of £——, to-

In consideration of 218*l.* 15*s.* paid to prior mortgagee.

NESSETH, that, in pursuance of the said agreement, and in consideration of the sum of 218*l.* 15*s.* of lawful money of

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gether with costs of suit. And these are further to authorize and empower you, my said attornies, or any of you, after the said judgment shall be entered up as aforesaid, in my name, and as my act and deed, to execute one or more effectual release or releases in the law to the said [*mortgagee*], his executors or administrators, of all errors, writs of error, and all benefit and advantage thereof, and all defects and imperfections whatsoever, which may be committed or may happen or arise, in, or about, or concerning the action or judgment aforesaid, or in, or about, or concerning any writ, warrant, process, declaration, plea, entry, or other proceeding relating thereto respectively: And for what you, or any of you, shall do, or cause to be done in the premises, this shall be to you, and every of you, a sufficient warrant and authority. In witness, &c.

DEFEAZANCE.

DEFEAZANCE ON WARRANT OF ATTORNEY.

MEMORANDUM, that the above-written warrant of attorney is given for securing the payment by the above-named [*mortgagor*], his heirs, executors, or administrators, unto the above-named [*mortgagee*], his executors, administrators, or assigns, of the principal and interest monies, collaterally with a certain indenture of mortgage*, bearing even date with the above-written warrant of attorney, made between [*prior mortgagee*], of the first part; the said [*mortgagor*], and [*other mortgagor*], of the second part; the said [*mortgagee*] of the third part; and [*trustee of term*] of the fourth part; whereby, and by virtue of a lease for a year precedent thereto, certain hereditaments were conveyed and assured unto and to the use of the said

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* It is not essential to the validity of a warrant of attorney, that collateral securities should be referred to in the defeazance. *Sansom* v. *Goode*, 2 B. & A. 568.

Great Britain and Ireland, (being part of the said sum of 300*l.* so agreed to be advanced and lent by the said [*pre-*

BY TENANT FOR LIFE AND REMAINDER-MAN.

[*mortgagee*], his heirs and assigns, subject to a proviso for the redemption of the said hereditaments, if the said [*mortgagors*], or either of them, their or either of their heirs, executors, administrators, or assigns, did and should pay, or cause to be paid, unto the said [*mortgagee*], his executors, administrators, or assigns, at the common dining hall of the Middle Temple, London, the sum of 300*l.* of lawful money of Great Britain and Ireland, on the —— day of —— now next ensuing, with interest for the same from the day of the date of the said indenture, after the rate of five pounds *per cent. per annum*, without making any deductions out of the same sums and interest respectively, for taxes or on any other account whatsoever. Now *it is hereby declared and agreed*, that no execution shall be issued upon the said judgment to be entered up by virtue of the above-written warrant of attorney, until default shall have been made in the payment of the whole or some part of the principal and interest monies intended to be secured by the said indenture of mortgage, according to the proviso for redemption contained in the said indenture; But, in case default shall be made in payment of the said monies, or any part thereof, then it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, immediately thereupon to issue execution, or cause execution to be issued, upon the said judgment, for such sum or sums of money as shall then be due for principal and interest, or either of them, by virtue of the said indenture of mortgage. And it is hereby declared and agreed, that it shall not be necessary for the said [*mortgagee*], his executors, administrators, or assigns, to revive or cause to be revived the said judgment, or do any act, matter, or thing for keeping the same on foot, although there shall have been no proceeding thereon within one year immediately preceding the issuing of such execution. And it is further declared and agreed, that, after the full payment of the sum and sums of money

BY TENANT FOR LIFE AND REMAINDER-MAN.

sent mortgagee] as aforesaid), to the said [*prior mortgagee*], in hand, at or before the execution of these pre-

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intended to be secured, as aforesaid, and all the costs, charges, and expenses (if any) occasioned by the non-payment thereof, the said [*mortgagee*], his executors, administrators, or assigns, will or shall, at the request, and at the costs and charges of the said [*mortgagor*], his heirs, executors, administrators, or assigns, acknowledge satisfaction, or cause satisfaction to be acknowledged, upon the record of the judgment to be entered up by virtue of the said warrant of attorney, or assign or dispose of the same judgment, and all benefit thereof, unto such person or persons, and in such manner, as the said [*mortgagor*], his executors, administrators, or assigns, shall direct. As WITNESS the hands of the said parties, this —— day of ——*."

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* As to the registration of warrants of attorney, *vide ante*, Vol. 2, p. 345. The effect of bankruptcy, since the late act, upon judgments entered up on warrants of attorney, has already been considered. *Vide ante*, p. 235.

Effect of bankruptcy upon judgments as affecting third persons.

A material question sometimes arises, as to how far the bankruptcy of a judgment-debtor affects the judgment as a lien on the real estate in the hands of third persons. As against the assignees and creditors, the judgment is clearly void, as well with reference to the real as to the personal estate of the bankrupt, (*vide* clause in stat. 6 Geo. 4, c. 16, s. 108, stated *ante*, p. 236); and it is probable, that, by analogy to the late decisions respecting executions by *fi. fa.*, it would be held, that an *elegit* before the delivery of possession is liable to be defeated by an act of bankruptcy.

It should seem, however, that if the bankrupt had, previously to his bankruptcy, sold lands liable to the judgment, as between the judgment-creditor and the purchaser, it would not be affected by the bankruptcy of the debtor. Thus, in the case of *Orlebar* v. *Fletcher*, 1 P. W. 739, it seems to have been an admitted point, that, if a trader, seised of land in fee, confessed a judgment to A., and then sold the land to B., and afterwards became bankrupt, though A., the judgment-creditor, could not come in upon the bankrupt's estate for any more than his proportion with the other creditors, yet he would be at liberty to extend his judgment against the purchaser, who bought the land prior to the bankruptcy. In *Sloper* v. *Fish*, 2 Ves. & Bea. 145, the bankruptcy intervened between the execution of the deeds of conveyance and the payment of the pur-

BY TENANT FOR LIFE AND REMAINDER-MAN.

sents, paid by the said [*present mortgagee*], at the request and by the direction of the said [*mortgagors*], (testified by their severally executing these presents), and in full satisfaction and discharge of and for all monies owing to him the said [*prior mortgagee*], for principal and interest, upon or by virtue of the said hereinbefore in part recited indenture of mortgage of the —— day of ——; the receipt of which said sum of 218*l.* 15*s.*, he, the said [*prior mortgagee*], doth hereby acknowledge, and of and from the same doth acquit, release, and for ever discharge the said [*present mortgagee*], and also the said [*mort-*

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chase money; and the question was, whether, assuming the conveyance to be absolute, and not, as was contended, an escrow only, a judgment-creditor had a claim upon the land, as against the lien of the assignees, for the purchase money; and Sir *William Grant*, M. R., considered the point to be too doubtful to compel a purchaser to take the title derived from the assignees.

Where the lands have not been sold, but mortgaged only by the bankrupt, the principle applicable to the case of a purchaser would not hold, inasmuch as the letting in the judgment against the mortgagee pushes the latter upon the equity of redemption which remained in the bankrupt, and therefore diminishes, *pro tanto*, the bankrupt's estate; but, in such a case, if the incumbrance were worth more than the land, the bankrupt's estate might be as little interested in the question as in the case of an absolute sale; the contest would be merely between the two creditors, namely, the judgment-creditor and the other incumbrancer, which of them should have the estate. In a case which came under the Editor's notice, in which A. confessed a judgment, then demised the lands to secure an annuity greatly exceeding their value, and afterwards became bankrupt, the judgment-creditor obtained and executed an *elegit*, to which no resistance was made by the annuitant. The point raised by such a case is extremely doubtful. There is this peculiarity in the case of an annuity; that, as the consideration money (by which the proveable value is regulated, *vide ante*, Vol. 1, 2nd ed. p. 472) may be greater or less than the actual value of the annuity, it may not be a matter of indifference to the bankrupt's estate, whether the annuitant or the judgment-creditor proves under the commission. If the consideration exceeded the value, the estate would lose by having the annuitant for a proving creditor instead of the judgment-creditor—*contra*, if it were less; for an annuitant having security might choose to go on receiving his annuity, instead of getting the value by means of a sale.

BY TENANT FOR LIFE AND REMAINDER-MAN.

gagors], and their respective heirs, executors, and administrators, by these presents; and also in consideration of the sum of 81*l.* 5*s.* of like lawful money, (being the residue of the said sum of 300*l.* so agreed to be advanced and lent by the said [*present mortgagee*], as aforesaid), to the said [*mortgagors*], in hand at or before the execution of these presents, paid, advanced, and lent by the said [*present mortgagee*]; the receipt and payment of which said several sums of 218*l.* 15*s.* and 81*l.* 5*s.* (making together the said sum of 300*l.*), they, the said [*mortgagors*], do hereby respectively acknowledge, and from the same respectively do, and each of them doth, acquit, release, and for ever discharge the said [*present mortgagee*], his heirs, executors, and administrators, by these presents: They, the said [*mortgagors*], *Have*, and each of them *Hath*, granted, bargained, sold, and released, and by these presents *Do*, and each of them *Doth*, grant, &c., unto the said [*present mortgagee*], his heirs and assigns, (in the actual possession, &c.), ALL THAT *(describe parcels); And also* all houses, outhouses, edifices, buildings, barns, stables, shops, dove-cots, yards, gardens, ways, paths, passages, cellars, sollars, sewers, sinks, drains, lights, easements, commons, waters, profits, commodities, privileges, rights, members, and appurtenances whatsoever, to the said messuage, tenement or inn, erections, buildings, hereditaments, and premises, or any part or parcel thereof, belonging or in anywise appertaining, or therewith now, or at any time heretofore, held, used, occupied, possessed, enjoyed, or accepted, reputed, deemed, taken, or known, as part, parcel, or member thereof; *And* the reversion and reversions, remainder and remainders, rents, issues, and profits, of all and singular the same premises; *And also* all the estate, right, title, interest, inheritance, use, trust, property, possession, right and equity of redemption, benefit, advantage, claim, and demand whatsoever, both at law and in equity, of them the said [*mortgagors*], or either of them, of, in, to, or out of the said several hereditaments and premises, every or any part or parcel thereof; And all deeds, evidences, and writings relating to the title of the said hereditaments now in their custody or power; TO HAVE AND TO HOLD the

And of residue of 300*l.* advanced to mortgagor.

Mortgagors release to mortgagee.

Parcels.

General words.

All the estate, &c.

Habendum.

said messuage, or tenement or inn, erections, buildings, hereditaments, and all and singular other the premises hereinbefore mentioned to be hereby granted and released, or intended so to be, with their and every of their rights, members, and appurtenances, unto the said [*present mortgagee*], his heirs and assigns, To THE ONLY PROPER USE and behoof of the said [*present mortgagee*], his heirs and assigns, for ever. *But subject, nevertheless,* to the proviso for redemption next hereinafter contained; (that is to say), PROVIDED ALWAYS, and it is hereby agreed and declared by and between the said parties to these presents, that, if the said [*mortgagors*], or either of them, their or either of their heirs, executors, or administrators, do and shall pay, or cause to be paid, unto the said [*present mortgagee*], his executors, administrators, or assigns, at the common dining hall of the Middle Temple, London, the said sum of 300*l.* of lawful money of Great Britain and Ireland, on the —— day of —— now next ensuing, with interest for the same from the day of the date of these presents, after the rate of 5*l. per centum per annum,* without making any deduction out of the same, or any part thereof, for or in respect of any taxes, [charges, assessments, or other impositions already taxed, charged, assessed, or imposed, or hereafter to be taxed, charged, assessed, or imposed, upon the said —— and premises hereby respectively granted and released, or upon the said sum of 300*l.* and interest hereby secured, or any part of the same respectively, or upon the said [*present mortgagee*], his heirs, executors, administrators, or assigns, in respect of the same, by any present or subsequent act of Parliament or other authority whatsoever, or for or by reason] or on account of any other matter, cause, or thing whatsoever; then and from thenceforth, and at any time thereafter, he the said [*present mortgagee*], his heirs or assigns, shall and will, at the request, costs, and charges of the said [*mortgagors*], or one of them, their or one of their assigns, or the heirs, executors, or administrators of the said [*mortgagor remainder-man*], reconvey and reassure all and singular the said hereby granted and released premises, with their appurtenances, unto and to the use of the said [*mortgagor ten-*

BY TENANT FOR LIFE AND REMAINDER-MAN.

To the use of mortgagee in fee.

Proviso for redemption.

BY TENANT FOR LIFE AND REMAINDER-MAN.

ant for life] and his assigns, during the term of his natural life; and, from and after his decease, unto and to the use of the said [*mortgagor remainder-man*], his heirs and assigns, for ever, freed and discharged of and from all incumbrances to be created or suffered by him the said [*present mortgagee*], his heirs, executors, administrators, or assigns, or any of them, in the meantime, any thing herein contained to the contrary thereof in anywise notwithstanding.

Joint and several covenant by mortgagors to pay principal and interest;

And the said [*mortgagors*] do hereby for themselves, their heirs, executors, and administrators, jointly, and each of them doth for himself, his heirs, executors, and administrators, severally covenant and agree with the said [*present mortgagee*], his heirs, executors, administrators, and assigns, by these presents, that they the said [*mortgagors*], or one of them, their or one of their heirs, executors, or administrators, will pay or cause to be paid unto the said [*mortgagee*], his executors, administrators, or assigns, the said sum of 300*l.*, together with interest for the same, at the time and place, and in manner hereinbefore mentioned and appointed for payment thereof, and without any deduction as aforesaid, according to the true intent and meaning of these presents;

that they stand seised,

And also, that they the said [*mortgagors*], or one of them (*a*), [now are or is, at the time of the sealing and delivery of these presents, lawfully, rightfully, and absolutely seised of, and interested in, the said —— and premises hereby granted and released, or intended so to be, with their and every of their appurtenances, of and for a good, sure, and perfect, absolute, and indefeasible estate of inheritance in fee simple in possession, without any manner of condition, contingency, trust, power of revocation, or limitation of use or uses, or other restraint, matter, cause, or thing whatsoever, to alter, vary, change, charge, revoke, defeat, make void, or determine the same:

and have power to convey.

And also that they the said [*mortgagors*], or one of them], now have or hath in themselves or himself, good right, full power, and lawful and

(*a*) Observe the difference between the covenants entered into by a tenant for life and remainder-man being mortgagors, and where these persons are vendors, *post*, Vol. 8, p. 38.

absolute authority, to grant and release the said —— and premises, with their and every of their appurtenances, unto and to the use of the said [*present mortgagee*], his heirs and assigns, in manner aforesaid, and according to the true intent and meaning of these presents; *And also*, that after default shall happen to be made in the payment of the said sum of 300*l.* or the interest thereof, or of any part thereof, contrary to the true intent and meaning of the proviso for redemption hereinbefore contained, it shall be lawful for the said [*present mortgagee*], his heirs or assigns, from time to time and at all times thereafter, peaceably and quietly to enter into, have, hold, and enjoy the said —— and premises hereby granted and released, [or mentioned or intended so to be, and every part and parcel thereof, with their and every of their rights, members, and appurtenances], and to receive and take the rents and profits thereof for his and their own use and benefit, without any interruption, claim, or demand whatsoever by the said [*mortgagors*], or either of them, or any other person or persons whomsoever; *And that* free and clear [and freely, clearly, and absolutely acquitted, exonerated, and discharged, or otherwise by the said [*mortgagors*] or one of them, their or one of their heirs, executors, or administrators, or some of them, well and sufficiently saved, defended, and kept harmless and indemnified], of, from, and against all [and all manner of former and other gifts, grants, bargains, sales, jointures, dowers, wills, entails, leases, mortgages, debts, charges, and] incumbrances whatsoever [heretofore had, made, committed, or suffered by the said [*mortgagors*] or either of them, or any other person or persons whomsoever]; *And also*, that they the said [*mortgagors*], and every other person whosoever having or lawfully claiming any estate, right, title, or interest, of, in, to, or out of the said —— and premises hereby granted and released, or any part thereof, will, from time to time, and at all times thereafter, at and upon the reasonable request of the said [*present mortgagee*], his heirs, executors, administrators, or assigns, but at the costs and charges of the said [*mortgagors*], or one of them, their or one of their heirs, executors, or administrators, make, acknowledge, levy, suffer, and execute, or cause and procure to

BY TENANT FOR LIFE AND REMAINDER-MAN.

For quiet enjoyment after default.

Free from incumbrances.

And for further assurance.

BY TENANT FOR LIFE AND REMAINDER-MAN.

be made, &c., all such further and other lawful acts, deeds, fines, recoveries, conveyances, and assurances in the law whatsoever, for the further, more perfectly, and effectually granting, releasing, assuring, and confirming the said —— and premises hereby granted and released, with their and every of their appurtenances, unto and to the use of the said [*present mortgagee*], his heirs and assigns, as by him the said [*present mortgagee*], his heirs, executors, administrators, and assigns, or his or their counsel in the law, shall be reasonably devised or advised, and required. And *it is hereby further declared and agreed*, that until default shall be made in payment of the said sum of 300*l.*, and interest for the same, as aforesaid, or some part thereof, in manner hereinbefore mentioned and appointed for payment of the same, it shall be lawful for the said [*mortgagor tenant for life*], and his assigns, during his life, and, after his decease, for the said [*mortgagor remainder-man*], his heirs and assigns, peaceably and quietly to hold and enjoy the said —— and premises hereby granted and released, [with their and every of their rights, members, and appurtenances], and to receive the rents and profits thereof, without any interruption, claim, or demand whatsoever, by the said [*present mortgagee*], his heirs, executors, administrators, and assigns, or any other person or persons whomsoever, lawfully claiming, or to claim, by, from, or under, or in trust for him or them.

Agreement for quiet enjoyment by mortgagor until default.

Further *testatum*.

And this indenture also witnesseth, that, in further pursuance of the said recited agreement, and in consideration of the said sum of 218*l.* 15*s.* so paid to the said [*prior mortgagee*] by the said [*present mortgagee*], as aforesaid; and also, in consideration of the further sum of 10*s.* of lawful money aforesaid to the said [*prior mortgagee*] in hand, at or before the execution of these presents, paid by the said [*trustee of term*], he, the said [*prior mortgagee*], at the request and by the direction of the said [*mortgagors*], and on the nomination of the said [*present mortgagee*] (testified by their severally executing these presents), *Hath* bargained, sold, assigned, transferred, and set over, and by these presents *Doth* bargain, &c., unto the said [*trustee of term*], his executors, administrators, and assigns, All that the said —— and pre-

Prior mortgagee, by the direction of mortgagor, assigns to a trustee for the present mortgagee.

Premises com-

BY TENANT FOR LIFE AND REMAINDER-MAN.

mises hereinbefore particularly described, and all and singular other the premises demised to the said [*prior mortgagee*], his executors, administrators, and assigns, in and by the said recited indenture of demise or mortgage, dated the —— day of ——, for the term of one thousand years, as aforesaid, and every part and parcel thereof, with their and every of their appurtenances: *And also* all the estate, right, title, interest, trust, property, possession, term and terms for years yet to come and unexpired, benefit, advantage, claim, and demand whatsoever, both at law and in equity, of him the said [*prior mortgagee*], of, in, to, or out of the same premises, and every or any part and parcel thereof: To HAVE AND TO HOLD the said ——, and all and singular other the premises hereby bargained, sold, and assigned, or intended so to be, with their and every of their appurtenances, unto the said [*trustee of term*], his executors, administrators, and assigns, henceforth, for and during all the residue now to come and unexpired of the said term of one thousand years granted to the said [*prior mortgagee*] in and by the said recited indenture of mortgage as aforesaid; and for all other his estate, term, and interest therein; *But* UPON TRUST, nevertheless, for the said [*present mortgagee*], his executors, administrators, and assigns, for the better and more effectually securing to him and them the repayment of the said sum of 300*l.*, and interest for the same, at such time and place, and in such manner as hereinbefore is mentioned and appointed for that purpose; And, subject thereto, IN TRUST to permit and suffer the said term of one thousand years to attend, wait upon, go along with, and be subservient to, the freehold and inheritance of the premises therein comprised, in order to protect the same from all mesne charges and incumbrances, (if any such there be); and upon or for no other trust, intent, or purpose whatsoever. AND the said [*prior mortgagee*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*trustee of term*], his executors, administrators, and assigns, that he the said [*prior mortgagee*] hath not heretofore made, done, or committed, or knowingly permitted, any act, deed, matter, or thing whatsoever, by means whereof the said ——

prised in recited mortgage.

And all the estate, &c.

Habendum for the residue of term of one thousand years.

Upon trust for present mortgagee to secure mortgage money;

And, subject thereto, to attend the inheritance.

Covenant by prior mortgagee that he has not incumbered.

BY TENANT FOR LIFE AND REMAINDER-MAN.

and premises hereby assigned, or any part thereof, are, is, can, shall or may be assigned, impeached, incumbered, or prejudicially affected, in any manner, howsoever. IN WITNESS, &c.

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS.

MORTGAGE *comprising* FREEHOLDS, LEASEHOLDS, *and* COPYHOLDS; *being an* APPOINTMENT *and* RELEASE *in Fee of the* FREEHOLDS, *an* UNDER-LEASE(*a*) *of the* LEASEHOLDS, *and a* COVENANT *to* SURRENDER *the* COPYHOLDS(*b*), *with usual Covenants and* APPOINTMENT *of* RECEIVER. *(Variation where the Premises are made* SALEABLE *in default of Payment).*

Parties.

THIS INDENTURE, &c., BETWEEN [*mortgagor*], of &c., of the first part; [*mortgagor's trustee*], of &c., of

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(*a*) As to mortgages by way of under-lease, *vide ante*, pp. 233, 320, 323.

Principle of contribution where estates belonging to different persons are included in one mortgage.

(*b*) Where several estates are included in one mortgage, and upon the death of the mortgagor they devolve, by devise, or descent, or otherwise, to different persons, a question necessarily arises as to the proportions in which the mortgage debt is to be borne by them.

The obvious rule in such cases is, to apportion the debt among the several estates, according to their relative value. Thus, if A. is seised of lands in Essex and lands in Kent, the lands in Essex being of double the value of the lands in Kent, and he mortgage the whole for 1500*l.*, and die intestate; the heir at common law taking the Essex estate, would be bound to contribute 1000*l.* towards the mortgage debt; and the heirs in gavelkind taking the Kent estate, would bear the remaining 500*l.* See *Haveningham* v. *Haveningham*, 2 Vern. 355, and 8 Ves. 390.

But this rule as to apportionment may, of course, be controlled by an indication of intention in the mortgage deed, that one estate should be the primary, and the other the secondary or auxiliary security only.

As to property being primarily or secondarily liable.

The intention, however, must be clearly manifested; and where A. conveyed freehold estates, by way of mortgage, for 1300*l.*, and, by the same indenture, "for better securing the payment," covenanted with the mortgagee to procure himself to be admitted to copyhold estates, and that he

the second part; [*mortgagee*], of &c., of the third part; and [*receiver*], of &c., of the fourth part. (*Recite convey-*

FREEHOLDS, LEASEHOLDS, AND COPY-HOLDS.

would surrender them to the mortgagee, and that until such surrender he would stand seised of the premises in trust for the mortgagee, Lord *Eldon* held that these words had not the effect of making the freeholds applicable first; but was the common form of a mortgage of freehold and copyhold estates, which did not pass by the same words of conveyance. Both, therefore, were equally liable. *Aldrich* v. *Cooper*, 8 Ves. 382.

But where two freehold estates were mortgaged by the same deed, the demise of the first being followed by the usual covenants for title and payment of the money, and the demise of the second estate was by a separate *testatum* clause, and declared to be for "the further, better, and more effectually securing" the mortgage money, "*and by way of collateral security for the same*," Lord *Eldon* was of opinion that the second estate was a subsidiary security only. Marquis of *Bute* v. *Cunynghame*, 2 Russ. 275.

Suggestion.

As the question in regard to the comparative value of several estates subject to a common mortgage, is very likely to produce disputes, it is always better for a person who is disposing by will, or otherwise, of estates so charged, among different persons, who are to take them *cum onere*, to declare the proportions in which they shall contribute to the incumbrance. Indeed, with a view to prevent all questions among the persons interested, it is often advisable to make distinct mortgages of several estates which are likely at a future time to become disunited in ownership, instead of comprising the whole in one security; and as, in such a case, the mortgagee cannot, according to the doctrine before discussed, *ante*, p. 400, redeem one without the other, the mortgagee's security is not affected by this distribution of the charge.

As to marshalling assets in the case of mortgages.

It is now clear, that, where freehold and copyhold estates are included in one mortgage, and the mortgagee dies, leaving creditors by specialty, or, in other words, creditors who have a claim upon the freeholds, but not upon the copyholds, the Court will marshal the assets at the instance of such creditors; that is, the copyhold estate will be applied, in the first instance, to the payment of the mortgage debt, in order to let in the general creditors upon the freeholds, and thereby create as large a fund as possible for the payment of the debts. *Aldrich* v. *Cooper*, 8 Ves. 382, (overruling *Robinson* v. *Tongue*, 1 Cox's P. W. 680, n.); *Gwynne* v. *Edwards*, 2 Russ. 289, n. And this doctrine would, of course, be applied as well in favour of the simple contract creditors of a trader, whose freehold lands are now subjected to the claims of such creditors, (see stat. 1 Wm. 4, c. 47, stated, *post*, Vol. 6, p. 351), as of specialty creditors.

And the principle in question is equally applicable in the case of two

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS.

ance of freeholds to uses in favour of the mortgagee to prevent dower; demise of leaseholds to mortgagor, and surrender to use of mortgagor of copyholds, and his admission thereto). AND WHEREAS the said [*mortgagee*], at the request of the said [*mortgagor*], hath agreed to lend and advance to him the sum of £—— at interest, on the security of a mortgage of the said freehold, leasehold, and copyhold messuages, lands, and hereditaments. NOW, THEREFORE, THIS INDENTURE WITNESSETH, that in consideration of the sum of £—— of lawful money of Great Britain and Ireland, lent and advanced by the said [*mortgagee*] to the said [*mortgagor*], at or immediately before the execution of these presents, the receipt of which said sum the said [*mortgagor*] doth hereby acknowledge, and therefrom doth acquit, release, and for ever discharge the said [*mortgagee*], his heirs, executors, administrators, and assigns, the said [*mortgagor*], in exercise and execution of the aforesaid power or authority reserved to him by the said hereinbefore in part recited indenture of release, and of all other powers and authorities in anywise enabling him in this behalf, *Doth* hereby direct, limit, and appoint, that the said ——, and other the hereditaments hereinafter described, and hereby re-

Recital of agreement for loan.

Testatum.

In consideration of principal sum, mortgagor appoints—

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mortgagees, the one having a charge on two estates, and the other on one only of those estates. Thus, "suppose a person who has two real estates, mortgages both to one person, and afterwards only one estate to a second mortgagee, who had no notice of the first*, the Court, in order to relieve the second mortgagee, have directed the first to take his satisfaction out of that estate only, which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee, even though the estates descended to two different persons." *Per* Lord *Hardwicke* in *Lanoy* v. Duke of *Athol*, 2 Atk. 446; see also Lord *Eldon's* judgment in *Aldrich* v. *Cooper*, 8 Ves. 388.

And where the Crown has resorted to a mortgaged estate, instead of taking other property liable to the extent, the mortgagee, it seems, will be allowed to stand in the place of the Crown, in respect of such other property, to the extent to which the mortgaged estate has been exhausted, even against other creditors of the Crown debtor. See 8 Ves. 388; 1 Vern. 455.

* *Sed quære* the necessity of this circumstance.

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS.

leased, or intended so to be, together with all the rights, members, and appurtenances thereunto belonging, shall henceforth remain, continue, and be *To the use* of the said [*mortgagee*], his heirs and assigns, for ever; subject, nevertheless, to the proviso or agreement for redemption of the said premises hereinafter contained. AND THIS INDENTURE FURTHER WITNESSETH (*b*), that, for the considerations hereinbefore expressed, and in consideration of the sum of 10*s.* of lawful money aforesaid, paid by the said [*mortgagee*] to the said [*trustee*] and [*mortgagor*], at or immediately before the execution of these presents, the receipt whereof is hereby acknowledged, the said [*trustee*], at the request and by the direction of the said [*mortgagor*], testified by his executing these presents, *Hath* bargained, sold, and released, and by these presents *Doth* bargain, sell, and release; and the said [*mortgagor*] *Hath* granted, bargained, sold, released, and confirmed, and by these presents *Doth* grant, bargain, sell, release, and confirm unto the said [*mortgagee*] and his heirs, (in the actual possession of the said [*mortgagee*] now being, by virtue of a bargain and sale to him thereof made by the said [*trustee*] and [*mortgagor*], in consideration of 5*s.* apiece, by indenture bearing date the day next before the day of the date of these presents, for one whole year, to commence from the day next before the day of the date of the said indenture of bargain and sale, and by force of the statute made for transferring uses into possession), ALL THAT, *(describe freehold parcels);* together with all houses, &c.; And all the estate, &c.; And all deeds, &c. To HAVE AND TO HOLD the said —— and hereditaments, and other the premises hereby released, or intended so to be, and every part and parcel of the same, with their appurtenances, unto the said [*mortgagee*], his heirs and assigns, To THE ONLY USE of the said [*mortgagee*], his heirs and assigns, for ever; *subject, nevertheless,* to the proviso or agreement for redemption hereinafter contained. AND THIS INDENTURE ALSO WITNESSETH, that, for the considerations hereinbefore expressed, and also in consideration of the sum of 10*s.* of lawful money aforesaid paid by the said

To the use of mortgagee in fee.

Further *testatum.*

Mortgagor and his trustee release.

Parcels.

Habendum.

To the use of mortgagee in fee.

(*b*) As to the practice of adding a release to an appointment in these cases, *vide ante*, p. 255.

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS.

[*mortgagee*] to the said [*mortgagor*], at or before the execution of these presents, the receipt whereof is hereby acknowledged, he the said [*mortgagor*] *hath* granted, bargained, sold, and demised, and by these presents *doth* grant, bargain, sell, and demise unto the said [*mortgagee*], his executors, administrators, and assigns, ALL THAT (*describe leasehold parcels*); and all other the premises comprised in and demised by the said hereinbefore in part recited indenture of lease, of or about the —— day of ——, and every part and parcel of the same, with their appurtenances; TO HAVE AND TO HOLD the said ——, and all other the said leasehold premises hereby demised, or intended so to be, and every part and parcel of the same, with their appurtenances, unto the said [*mortgagee*], his executors, administrators, and assigns, henceforth during all the residue now to come and unexpired of the said term of —— years, granted by the said hereinbefore in part recited indenture of lease, except the last day of the said term; and for all other the estate, term, and interest of the said [*mortgagor*] therein, except the last day of such estate, term, and interest; *subject, nevertheless,* to the proviso or agreement for redemption hereinafter contained. AND THIS INDENTURE YET FURTHER WITNESSETH, that, for the considerations hereinbefore expressed, he the said [*mortgagor*] *Doth* hereby, for himself, his heirs, executors, and administrators covenant and agree with the said [*mortgagee*], his heirs and assigns, that he the said [*mortgagor*], or his heirs, shall and will, at his or their own costs and charges, at the next general court, or in the meantime at some special court to be holden in and for the said manor of ——, in the county of ——, well and effectually surrender, or cause to be surrendered, into the hands of the lord or lords, lady or ladies, of the said manor, according to the custom of the same manor, ALL THAT the said copyhold or customary, (*describe copyhold parcels*); together with all ways, waters, water-courses, paths, passages, trees, woods, underwoods, commons, commonable rights, hedges, ditches, fences, liberties, privileges, profits, commodities, advantages, and appurtenances whatsoever, to the said copyhold —— and premises hereby covenanted to be surrendered, or intended so to be, or to

Mortgagor demises to mortgagee,

—premises comprised in lease.

Habendum.

For all the residue of term of lease, except the last day.

Further *testatum.*

Mortgagor covenants to surrender copyholds.

General words.

any of them, or to any part thereof respectively belonging, or in anywise appertaining; *And* the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of the said copyhold —— and premises; And all the estate, right, title, interest, use, trust, inheritance, property, possession, benefit, claim and demand whatsoever, both at law and in equity, or otherwise howsoever of him the said [*mortgagor*], of, in, to, out of, or upon the said copyhold —— and premises hereby covenanted to be surrendered, or intended so to be, with their appurtenances, *To the use* of the said [*mortgagee*], his heirs and assigns, at the will of the lord, according to the custom of the said manor, at and under the customary rents and services therefore due, and of right accustomed; *And that* in the meantime, and until such surrender shall be made, and the said [*mortgagee*], or his heirs, shall be admitted tenant or tenants of the said copyhold premises, he the said [*mortgagor*] and his heirs shall and will stand and be seised of the same copyhold —— and premises, with their appurtenances, upon trust for the said [*mortgagee*], his executors, administrators, and assigns; *subject, nevertheless,* to the proviso or agreement for redemption hereinafter contained; that is to say, Provided always, *and it is hereby declared and agreed by and between the said parties to these presents,* that if the said [*mortgagor*], his heirs, executors, or administrators do and shall pay, or cause to be paid, unto the said [*mortgagee*], his executors, administrators, or assigns, at or in the Royal Exchange in the City of London, on the —— day of —— next ensuing, the sum of £ —— of lawful money of Great Britain and Ireland, with interest for the same from the day of the date of these presents, after the rate of 5*l.* for every 100*l.* by the year (*c*); and if the said [*mortgagor*] do and shall on demand pay unto and reim-

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS.

And all the estate, &c.

To the use of mortgagee in fee.

Proviso for redemption.

(*c*) If the mortgage is made by *assignment* of the leaseholds, instead of an underlease, and a power of sale, *ut post*, p. 501, is to be introduced, add—

"and if the said [*mortgagor*], his heirs, executors, or administrators shall henceforth pay the rent, and observe and perform the covenants, by and in the said hereinbefore in part recited indenture of lease reserved and contained, and

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS.

burse the said [*mortgagee*], his executors, administrators, or assigns, all such sums of money (if any) as he or they shall have paid and expended, as and for the fine on his or their admission to the said copyhold —— and premises, hereby covenanted to be surrendered, or for other the fines, duties, and services henceforth to become due in respect thereof, with interest thereon after the rate aforesaid, (such sum or sums of money not exceeding in the whole, together with the said sum of £—— hereby intended to be secured, the principal sum of £——; and do and shall make the said payments respectively, without any deduction whatsoever [out of the same or any part thereof, for or in respect of taxes or impositions already charged or imposed, or hereafter to be charged or imposed upon the said freehold, leasehold, and copyhold —— and hereditaments hereby intended or covenanted to be assured, or any of them, or upon the said [*mortgagee*], his heirs, executors, administrators, or assigns, for or in respect thereof, by authority of Parliament or otherwise howsoever], then and immediately thereupon, he the said [*mortgagee*], his heirs, executors, administrators, or assigns, shall and will, upon the request, and at the costs and charges of the said [*mortgagor*], his heirs, executors, administrators, or assigns, release, assign, surrender, and reassure the said freehold, leasehold, and copyhold —— and hereditaments respectively hereby released, demised, and covenanted to be surrendered, or otherwise assured, or intended so to be, with their respective appurtenances, unto and to the use of, or in trust for, the said [*mortgagor*], his heirs, executors, administrators, and assigns, or unto such person or persons as he or they shall direct or appoint, free from all incumbrances to be created by the said [*mortgagee*], his heirs, executors, administrators, or assigns, in the meantime (*d*). And the said [*mortgagor*] doth hereby for him-

Covenant by mortgagor to pay mortgage money.

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which on the lessee's part are or ought to be paid, observed, and performed;"

(*d*) If a power of sale is intended to be given in default of payment, proceed as follows—

Trust for sale in case of default of payment of

"But in case default shall be made by the said [*mortgagor*], his heirs, executors, administrators, or assigns, in

self, his heirs, executors, and administrators, covenant and agree with the said [*mortgagee*], his executors, adminis- FREEHOLDS, LEASEHOLDS, AND COPYHOLDS.

payment of the said sum of £—— or the interest thereof, or any part thereof respectively, at the time and in manner hereinbefore appointed for the payment thereof; and the said [*mortgagee*], his heirs, executors, administrators, or assigns, shall, at any time or from time to time after such default shall be made, give or deliver to the said [*mortgagor*], his heirs or assigns, with respect to the said freehold and copyhold hereditaments, and unto the said [*mortgagor*], his executors, administrators, or assigns, with respect to the said leasehold premises, or leave at his or their usual place or places of abode, notice in writing, under the hand or hands of the said [*mortgagee*], his heirs, executors, administrators, or assigns, of his or their intention to proceed to a sale of the several hereditaments and premises hereby released, demised, or covenanted to be surrendered, or intended so to be, or some part or parts thereof, in the event of the non-payment of the whole of the said sum of £—— and the interest thereon, at the end of six calendar months from the time of giving or leaving such notice, or at the end of any longer period, to be specified in the said notice; And if the said sum of £——, or the interest thereon, or any part thereof respectively shall remain unpaid at the expiration of such period, or in case the said [*mortgagor*], his heirs, executors, or administrators, shall neglect or fail to pay the rent, and observe and perform the covenants reserved and contained by and in the hereinbefore in part recited indenture of lease of the —— day of ——, and which on the lessee's part ought to be observed and performed*, or shall fail or neglect, when mortgage money, &c.

* Although, where the mortgage is by way of underlease, and the mortgagee therefore contracts no personal liability to the covenants of the lease, it is not necessary to make the performance of these covenants a condition precedent to the redemption of the mortgaged property, since, if the mortgagee gets his money, he has no reason to complain of a forfeiture having been incurred by their non-performance, (*vide ante*, p. 500); yet, where there is a power of sale, it seems proper to make the premises saleable on this event. The addition, *ante*, p. 500, should then be made to the proviso for redemption.

FREEHOLDS, LEASEHOLDS, AND COPY-HOLDS.

trators, and assigns, that he the said [*mortgagor*], his heirs, executors, or administrators, will pay or cause to be

thereunto requested, to pay unto or reimburse the said [*mortgagee*], his executors, administrators, or assigns, all such sums of money (if any) as he or they shall have paid or expended for all or any of the purposes mentioned in the proviso or agreement for redemption hereinbefore contained, and interest thereon as aforesaid; Then, and in all, or any or either of the said cases, it shall be lawful for the said [*mortgagee*], his heirs, executors, administrators, or assigns, at any time or times thereafter, so long as the same monies or any part thereof respectively shall remain unpaid, in the discretion and of the absolute authority of the said [*mortgagee*], his heirs, executors, administrators, or assigns, and without the necessity of renewing or reviving the said notice, or of obtaining any further consent or concurrence on the part of the said [*mortgagor*], his heirs, executors, administrators, or assigns, to make sale and absolutely dispose of the said messuages, closes, lands, tithes, hereditaments, and premises hereby respectively released, demised, and covenanted to be surrendered, or intended so to be, or any part or parts thereof, with their appurtenances, either together or in parcels, and either by public auction or private contract, at such price or prices as can be reasonably gotten for the same, with liberty to purchase in the same at any auction or auctions, as often as it shall be deemed expedient so to do, and resell the same hereditaments, or any part thereof, by public auction or private contract, without being answerable for any loss or diminution of price to be occasioned thereby, and to convey and assign the same when sold unto the purchaser or purchasers thereof, and in such manner as he, she, or they shall order or direct, and to receive the monies to arise from the sale or sales; AND UPON TRUST, by, with, or out of the monies to arise from such sale or sales aforesaid, or by, with, or out of the rents, issues, and profits of the said several hereditaments and premises, until the sale thereof, in the first place, to satisfy and discharge all the expenses incident to such sale or sales, and to the execu-

Trust of monies to arise from sale.

paid unto the said [*mortgagee*], his executors, administrators, or assigns, the said principal sum of £——, and

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS.

tion of these present trusts; and in the next place to retain, or pay and satisfy unto himself or themselves, the said [*mortgagee*], his executors, administrators, or assigns, the said sum of £——, or so much thereof as shall then remain unpaid, together with all interest which shall be then due for the same, and together with all such sum and sums of money, costs, losses, damages, and expenses, as the said [*mortgagee*], his executors, administrators, or assigns, shall pay, sustain, or incur, by reason of the non-payment of the same sum and interest, at the time and in manner hereinbefore appointed for payment thereof, or by reason of the breach or non-performance by the said [*mortgagor*], his heirs, executors, or administrators, of any of the covenants and agreements on the part of him the said [*mortgagor*] herein contained, (subject as to the amount thereof to the limitation aforesaid), with interest, at the rate of *5l. per cent. per annum* on all such monies from the time of the payment thereof respectively; And in case, after full payment and satisfaction unto the said [*mortgagee*], his executors, administrators, or assigns, of the said sum of £—— and interest, and arrears of interest, and all the several costs, losses, damages, and expenses, and interest thereon as aforesaid, either by the means aforesaid, or by any other means, any residue or surplus of the monies to arise from the sale or sales aforesaid, shall remain in the hands of the said [*mortgagee*], his heirs, executors, administrators, and assigns, unapplied to any of the purposes aforesaid: Then Upon trust to pay such residue or surplus unto the said [*mortgagor*], his heirs, executors, administrators, or assigns, for his or their own absolute use and benefit; but in case the sum of £—— and all interest for the same, and all such costs, losses, damages, expenses, and interest (if any) as aforesaid, shall be fully paid and satisfied by the said [*mortgagor*], his heirs, executors, administrators, or assigns, before the whole or any part of the said premises shall have been sold under the trust aforesaid, Then Upon trust, at the request, and at the

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS.

interest for the same after the rate aforesaid, at the place and on or at the day and time hereinbefore appointed for payment of the same respectively, without any deduction or abatement whatsoever, according to the true intent and meaning of these presents; and that he the said [*mortgagor*], his heirs, executors, or administrators, will, so long as any sum or sums of money shall remain owing upon the security hereby made, pay the rent, and perform the covenants and agreements on the lessee's part reserved and contained by and in the said recited indenture of lease, and which shall accrue due, and ought to be performed, during the period that the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall be in the possession of, or the receipt of the rents and profits of, the said leasehold premises; *And also* will pay the fine and other expenses to become payable on the admission of the said [*mortgagee*], his heirs or assigns, to the said copyhold —— and premises hereby covenanted to be surrendered; and will also pay, render, and perform all other the fines, rents, and services, which ought henceforth to be paid, rendered, and performed, for or in respect of the same, during so long as the said [*mortgagor*], his heirs or assigns shall be in the possession of, or the receipt of the

And to pay the rent and perform the covenants of the lease.

And pay the fines, &c., of the copyholds.

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costs and charges of the said [*mortgagor*], his heirs or assigns, (with respect to the said freehold and copyhold premises), and of the said [*mortgagor*], his executors, administrators, or assigns, (with respect to the said leasehold premises), to reconvey, assign, surrender, and reassure the said several hereditaments and premises, or so much or such part or parts thereof as shall remain unsold, unto the said [*mortgagor*], his heirs, executors, administrators, or assigns, according to the nature and quality thereof respectively, or to such person or persons, and in such manner, as he or they shall direct, free from all estates, rights, titles, charges, and incumbrances, to be made, created, or occasioned by the said [*mortgagee*], his heirs, executors, administrators, or assigns, in the meantime; And upon or for no other trust, intent, or purpose whatsoever. (*Add indemnities to purchasers, ut ante*, p. 475).

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS.

rents and profits of, the said copyhold premises; And shall and will save harmless, and keep indemnified, the said [*mortgagee*], his executors, administrators, and assigns, from and against the payment and performance of the same fines, rents, and services respectively; And also from and against all actions, suits, forfeitures, costs, charges, damages, and expenses to be brought against, or incurred or paid by the said [*mortgagee*], his executors, administrators, or assigns, and all distresses, seizures, executions, and other proceedings which shall or may be taken or instituted against the said copyhold premises, by reason or on account of the non-payment and non-performance of the same fines, costs, and services respectively, or otherwise in relation thereunto. *And also*, that he the said [*mortgagor*], his heirs, executors, or administrators, shall and will, on demand, pay unto and reimburse the said [*mortgagee*], his executors, administrators, or assigns, all such sum and sums of money as he or they shall at any time hereafter pay or expend in and about the payment, performance, and observance of all or any of the rents, fines, duties, and services, henceforth to become due and payable, and which ought to be paid, observed, and performed, in respect of the said leasehold and copyhold premises, or any part thereof, whether before or after he or they shall have entered into the possession of the same premises, (but not exceeding the amount aforesaid), with interest for the same sum and sums of money at the rate of *5l. per cent. per annum*, from the time or respective times of the same being so paid or expended as aforesaid. And the said [*mortgagor*] for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*mortgagee*], his heirs and assigns, for and in respect of the said freehold and copyhold hereditaments respectively hereby released and covenanted to be surrendered, or intended so to be, and with the said [*mortgagee*], his executors, administrators, and assigns, for and in respect of the said leasehold premises hereby demised, or intended so to be, in manner following (that is to say), that the said [*mortgagor*] and [*trustee*] are now seised to them and their heirs, or one of them is seised to him and his heirs, of the said freehold —— and heredita-

To reimburse mortgagee sums expended in payment of rents, &c.

Covenant by mortgagor.

That mortgagor and his trustee are seised in fee of the freeholds.

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS.

ments hereby released, or intended so to be, with the appurtenances, for a lawful, absolute, and indefeasible estate of inheritance in fee simple in possession; *And also*, that

That lease is valid.

the said hereinbefore in part recited indenture of lease, bearing date on or about the —— day of ——, is a good, valid, and subsisting lease in the law, for the residue of the said term of —— years, and is in nowise forfeited, surrendered, determined, or made void or voidable, and that the rent and covenants reserved and contained by and in the same indenture of lease on the lessee's part to be paid and performed, have been duly paid and performed up to

That he is seised of copyholds.

the day of the date of these presents; *And that* the said [*mortgagor*] is also now seised to him and his heirs of, or absolutely entitled to, the said copyhold —— and premises hereby covenanted to be surrendered, or intended so to be, with their appurtenances, for an absolute and indefeasible estate of inheritance in possession, at the will of the lord, according to the custom of the said manor:

That he and his trustee have power to release, &c.

And also, that the said [*mortgagor*] and [*trustee*], or one of them, as to the said freehold hereditaments, and the said [*mortgagor*], as to the said leasehold and copyhold premises, now have or hath in themselves or himself good right and absolute authority to grant, demise, surrender, and assure, or to cause to be granted, demised, surrendered, and assured, all and singular the said freehold, leasehold, and copyhold —— and premises hereinbefore expressed to be hereby released, demised, and covenanted to be surrendered respectively, with their respective appurtenances, unto or to the use and benefit of the said [*mortgagee*], his heirs, executors, administrators, and assigns respectively, for all the estates, terms, and interests therein, for which the same respectively are, or are intended to be hereby released, demised, and covenanted to be surrendered in manner aforesaid, according to the true

For quiet enjoyment after default.

intent and meaning of these presents; *And further*, that, after default shall have been made in payment of the said sum of £—— and interest, or other the monies hereinbefore mentioned, on the day and time hereinbefore appointed for the payment thereof, contrary to the proviso or agreement for redemption hereinbefore contained, or if the said [*mortgagor*], his heirs and assigns, shall not pay

and perform the rents and covenants reserved and contained by and in the said hereinbefore in part recited indenture of lease, and which on the lessee's part are or ought to be paid and performed, or shall not pay, render, and perform, the fines, rents, suits, and services, to accrue and become due and payable in respect of the said copyhold premises, then, and in either of the said cases, and immediately thereupon, it shall be lawful for the said [*mortgagee*], his heirs, executors, administrators, or assigns respectively, from time to time and at all times hereafter, during the continuance of the estates, terms, and interests respectively hereby released, granted, and covenanted to be surrendered, or otherwise assured, or intended so to be, [but, as to the said copyhold premises, not until he the said [*mortgagee*], his heirs, or assigns shall have been duly admitted as tenant or tenants thereof], peaceably and quietly to enter into and upon, and hold, possess, and enjoy the said freehold, leasehold, and copyhold —— and premises respectively hereby released, demised, and covenanted to be surrendered or otherwise assured, or intended so to be, with their respective appurtenances, and to receive and take the rents and profits thereof respectively, without any hinderance, interruption, or denial whatsoever, from or by the said [*mortgagor*], his heirs, executors, or administrators, or any other person or persons whomsoever: *And that* free and clear [and freely, clearly, and absolutely acquitted, released, exonerated, and discharged, or otherwise by him the said [*mortgagor*], his heirs, executors, and administrators, well and sufficiently kept harmless and indemnified, of], from, and against all [and all manner of former and other grants, bargains, sales, mortgages, demises, appointments, statutes, judgments, recognizances, extents, titles, liens], charges, and incumbrances whatsoever, at any time or times heretofore, or to be from time to time hereafter, had, made, done, occasioned, permitted, or suffered by the said [*mortgagor*], or his heirs, executors, and administrators, or any other person or persons whomsoever, (except, as to the said leasehold premises hereby demised, the rent and covenants reserved and contained by and in the said hereinbefore in part recited indenture of lease, bearing date on or about the —— day of ——,

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS.

Free from incumbrances.

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS.

and which on the lessee's part are or ought to be henceforth paid and performed; and except, as to the said copyhold premises, the rents, fines, suits, and services, henceforth to become due in respect thereof, and of right accustomed); *And moreover*, that he the said [*mortgagor*], and his heirs, executors, and administrators, and every other person whosoever, lawfully and equitably or rightfully claiming or to claim any estate, right, title, trust, charge, or interest, of, in, to, out of, or upon the said freehold, leasehold, and copyhold —— and premises hereby respectively released, demised, and covenanted to be surrendered, or otherwise assured, or intended so to be, or any part or parts of the same (except the persons respectively whose estates and interests are hereinbefore excepted), will, from time to time, and at all times hereafter, upon every reasonable request of the said [*mortgagee*], his heirs, executors, administrators, or assigns, but at the costs and charges of the said [*mortgagor*], his heirs, executors, administrators, or assigns (*e*), make, do, acknowledge, levy, suffer, execute, and perfect, or cause to be made, done, acknowledged, levied, suffered, executed, and perfected, all such further lawful acts, deeds, conveyances, demises, surrenders, and assurances in the law whatsoever, for the more effectually conveying, releasing, surrendering, confirming, or otherwise assuring the said freehold and copyhold —— and hereditaments respectively hereby released, or otherwise assured, or covenanted to be surrendered, or intended so to be, with the appurtenances, unto and to the use of the said [*mortgagee*], his heirs and assigns; and also for demising or otherwise assuring the said leasehold —— and premises hereby demised, or otherwise assured, or intended so to be, with their appurtenances, unto the said [*mort-*

And for further assurance.

(*e*) If a power of sale is introduced, add—

"until the said hereditaments shall have been sold and conveyed under or by virtue of the trust for sale hereinbefore contained, and, after such sale and conveyance, at the costs and charges of the purchaser or purchasers thereof, his, her, or their heirs, executors, administrators, or assigns."

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS.

gagee], his executors, administrators, and assigns, during all the residue which shall be then unexpired of the said term of —— years, according to the true intent and meaning of these presents, and, subject to such right or equity of redemption (if any) as the hereditaments respectively shall be subject and liable to, by virtue of the said proviso or agreement for redemption hereinbefore contained (*f*), as

(*f*) If there is a trust for sale, it is better to omit these words.

Doctrine, *once a mortgage always a mortgage*, considered.

The right of redemption is an inseparable incident of a mortgage, and cannot be controlled or defeated by any agreement of the parties. Therefore, if an intention to make a mortgage *ab origine*, and not an absolute conveyance, can be collected from the instrument, a Court of equity will hold any stipulation tending to fetter the right to redeem to be void, regarding such stipulation in the light of a penalty annexed by the parties to the non-payment of the money, and consequently relievable in equity, upon the same principle as that upon which it interferes in the ordinary case of a mortgage which has become absolute at law*. And this principle applies, whether the object of the restrictive clause be to confine the right of redemption to a particular class of the persons interested in the equitable ownership, or to restrain it to a particular period. In both cases, the mortgagor or his representatives will be allowed to redeem at any time within the period prescribed by the general rule of the Court; *i. e.* within twenty years after any dealing between the parties with the estate, or recognition by the mortgagee of the instrument as a mortgage.

Thus, a proviso that the mortgagor shall redeem *during his life*, has been held not to exclude redemption by the heir. *Jason* v. *Eyres*, 2 Ch. Cas. 33; *Kilvington* v. *Gardiner*, cit. 1 Vern. 192; *Newcomb* v. *Bonham*, 1 Vern. 8; *Orde* v. *Smith*, Sel. Ch. Cas. 9, 10. See also *Eaton* v. *Greaves*, 1 Vern. 138; *Price* v. *Perrie*, 2 Freem. 258.

And where the right of redemption was limited to the mortgagor *and the heirs male of his body*, and the mortgagor expressly covenanted that no other person should be permitted to redeem, redemption was decreed at the suit of a jointress, (the mortgagor having died without issue), the reason alleged being that "an estate cannot at one time be a mortgage, and at another time cease to be so, by one and the same deed." *Howard* v. *Harris*, 1 Vern. 33, 190; *S. C.* 2 Ch. Cas. 147.

And where the defeazance is contained in a separate deed (which was formerly a common mode of mortgaging), the same rule applies. Thus,

* The doctrine, and the grounds upon which it rests, are stated with much perspicuity and precision, by Mr. Coote, in his Treatise on Mortgages, p. 21, *et seq.*

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS.

by the said [*mortgagee*], his heirs, executors, administrators, and assigns, respectively, or his or their counsel in

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if A. execute an absolute conveyance to B., and B., by another deed, declare, that, on the payment of the purchase-money within a given period, B. may redeem, redemption may be insisted on notwithstanding the prescribed period has been suffered to elapse. *Manlove* v. *Bale*, 2 Vern. 84; *Bowen* v. *Edwards*, 2 Ch. Rep. 221; *Clench* v. *Witherly*, Cas. Temp. Finch, 376; *Spurgeon* v. *Collier*, 1 Ed. 55; *Baker* v. *Wind*, 1 Ves. sen. 160.

And where the mortgagee fraudulently refused to execute the defeazance, as stipulated, after the absolute conveyance had been executed by the mortgagor, the Court decreed a redemption in the same manner as if the defeazance had been duly made. Cas. Anon. cit. *Maxwell* v. Lady *Mountacute*, Prec. Ch. 526; see also *Walker* v. *Walker*, 2 Atk. 99; *Young* v. *Peachy*, Ib. 257; *Dixon* v. *Parker*, 2 Ves. sen. 225; Coote, Mortg. 25.

And, by the rule under consideration, a collateral agreement, that, in case of the non-payment of the mortgage money by the mortgagor, *and on the payment of a further sum by the mortgagee*, the latter shall become entitled, as purchaser, to the equity of redemption, will be inoperative to exclude the right to redeem on repayment of these sums. Thus, in *Willett* v. *Winnell*, 1 Vern. 488, where A. mortgaged his estate for 200*l.* to B., and, at the same time, entered into a bond, with a condition, that, if the 200*l.* and interest should not be paid at the day, then, if B. should pay him the further sum of 78*l.* in full for the purchase of the premises, within ten days afterwards, the bond should be void. A. died before the mortgage became forfeited. The 200*l.* was not paid at the day, and B. paid the 78*l.* to A.'s administrator. The heir of A. brought his bill to redeem; B. insisted that it was an absolute purchase; but the Court decreed a redemption, "making no doubt that it continued a mortgage, and was not an absolute conveyance."

In *Jennings* v. *Ward*, 2 Vern. 520, where W. lent 16,000*l.* to N. on mortgage, and, in another deed executed at the same time, he took a covenant from N. that he would convey to him, if he thought fit, ground rents to the value of 16,000*l.* at the rate of twenty years' purchase: on a bill by N. to redeem, W. insisted on that agreement as a bar to the right of redemption; but the Master of the Rolls decreed a redemption on payment of principal, interest, and costs, and without regard to that agreement, setting it aside as unconscionable; for a man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any bye-agreement.

It is quite clear that any collateral benefit reserved to the mortgagee as consequential on the non-payment of the money at the time appointed, would fall within the principle in question, though a further consideration

the law, shall be reasonably advised and required. *Provided always, and it is hereby declared and agreed by and* Proviso for quiet enjoyment by mortgagor until default.

were to move from the mortgagee, and a further act to be done by the mortgagor. See *Price* v. *Perrie*, 2 Freem. 258. But, of course, an agreement to limit to the mortgagee a further interest in the mortgaged property, by way of additional security, in default of payment (according to the form of the covenant for further assurance, frequently used in mortgages by demise, *ut ante*, p. 241), is not liable to any such objection, as the additional interest so derived would be subject to the same equity of redemption as that created by the mortgage deed; but the declaration (sometimes added), that the interest to be assured by virtue of the covenant shall be discharged from the equity of redemption, is nugatory, and ought to be omitted.

It is clear, too, that an agreement giving to a mortgagee the advantage of pre-emption in case of the mortgagor disposing of the property, would be sustained, as such an agreement has no compulsory operation in regard to the terms of the sale, or, indeed, in enforcing a sale at all; but leaves an option to the mortgagor whether to sell or not, and on what conditions. See *Orby* v. *Trigg*, 2 Eq. Ca. Ab. 599, pl. 24.

The doctrine under consideration seems to have been somewhat relaxed in certain instances, where there was ground to presume, from the relationship subsisting between the parties, that the grantor intended a benefit to the party advancing the money *ultrà* the purpose of security. In *Bonham* v. *Newcomb*, 2 Vent. 364; *S. C.* 1 Ab. Eq. 312; 2 Ch. Cas. 58; 2 Freem. 67; 1 Vern. 7, 214, 232; where A., being seised in fee, in consideration of 1,000*l.* paid to him by B., who married his kinswoman, conveyed to him and his heirs, and took a re-demise for ninety-nine years, if he should live so long; and B. covenanted, that, if A. should pay 1,000*l.* (with the interest that should be due for the same) at any time during his life, B. should reconvey to him and his heirs; and that, if he did not pay the money, then that his heirs, &c., should have no power to redeem. He died, the money not being paid, and his heir preferred a bill to redeem. It was held by Lord *Nottingham*, that the heir might redeem, notwithstanding this restrictive clause; and that it was a rule, once a mortgage always a mortgage; that B. might have compelled A. to redeem in his lifetime, or have foreclosed him. But, on a re-hearing, Lord Keeper *North* reversed the decree, his Lordship dismissing the bill. He said, in a common mortgage, such a covenant to restrain redemption should not be regarded; *but this was made with an intention of a settlement of the estate*, besides the consideration of the money paid. And he denied that the mortgagor could have been, by the decree of this Court, limited to any time for payment of the money, for this Court cannot shorten the time

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS.

between the said parties hereto, that until default shall happen to be made in payment of the said sum of £——,

that is given by express covenant and agreement of the parties; but when that time is past, then the practice is to foreclose. And this decree of reversal was affirmed in the House of Lords.

Conditional purchases to be distinguished from mortgages.

The cases already stated, in which Equity has refused to give effect to an agreement for converting a mortgage transaction into a purchase on a given event or period, are carefully to be distinguished from those of conditional or defeasible settlements or purchases, where the original and primary intention manifestly is, that the property shall go according to the uses of the conveyance, with a reservation to the grantor of a power of defeating it on payment of a stipulated sum: for, if such be the clear *bonâ fide* intention of the parties, there is no principle of law, as administered in Courts of equity, which prevents them from requiring the strict performance of the proviso, in order to entitle the grantor to avail himself of it. The line of demarcation between mortgages and defeasible purchases is certainly not very broad; and in determining the actual nature and character of the transaction, it is often necessary, not only anxiously and minutely to examine the contents of the instrument, but also to look to the conduct of the parties acting under it. In regard to the former, the circumstance of there being no covenant by the grantor for the repayment of the consideration money, has always been considered as favouring the conclusion, that a purchase and not a mortgage is intended, though this circumstance is by no means conclusive; as such a covenant, though usual, is not an essential part of a security for money. Probably, the circumstance of the property being limited to uses to prevent dower, would be considered in the same point of view. In regard to circumstances *dehors* the instrument, the fact of the consideration money being equivalent to the value of the lands, and possession being delivered to the grantee at the execution of the conveyance, would be important, as characteristic of a purchase, rather than a mortgage, (see Cas. Temp. Talb. 63; 19 Ves. 415), as immediate possession rarely accompanies a deed intended as a security only; and the circumstance that the expenses of the conveyance are borne by the grantee, seems open to the same reasoning.

The following are the leading cases in which the instrument has been held to operate as an absolute conveyance or settlement with a clause of redemption, and not as a security merely. In *Endsworth* v. *Griffith*, 2 Eq. Ca. Ab. 595, pl. 6; *S. C.* 5 Bac. Ab. 9, lands in Wales were mortgaged for 400*l.*; afterwards, neither principal nor interest being paid at the time limited, the mortgagee brought an ejectment, got possession of the premises, and then obtained a release of the equity of redemption from

and interest, or other the monies hereinbefore mentioned, contrary to the proviso or agreement for redemption

the mortgagor, upon payment of 350*l.* more. A note was given at the time of executing the release, that the releasee, on payment of the 750*l.*, and all charges of repairs, within a year, by the releasor, should sell and convey to him the premises. Payment having been neglected for sixteen years, redemption was not allowed, the note being considered as an original agreement between the parties to sell and convey the premises upon the terms therein mentioned; but not that the releasor should be at liberty to redeem the same. The decree was affirmed by the House of Lords, 5 B. P. C. Toml. ed. 184.

Cases of defeasible purchases.

So, in *King* v. *Bromley*, 2 Eq. Ca. Ab. 595, pl. 8; *S. C.* 5 Bac. Ab. 10, where A., seised of a copyhold in fee, surrendered it upon his marriage to the use of himself and his wife, in special tail, remainder to her in fee, upon condition that if he paid 50*l.* at a day certain to the daughter that the wife had, then the whole surrender should be void. The day elapsed, the 50*l.* not paid, and the husband died without issue. On a bill to redeem, brought by his heir against a purchaser from the wife, the defendant pleaded that he was a purchaser for a valuable consideration, without notice; and it was resolved that this was not originally designed for a mortgage, but that the party, by settling it thus, had left it in his election, either to perform the condition by paying the money, or to let the settlement stand; he had chosen the latter: And the plea was allowed. In *Cotterell* v. *Purchase*, Ca. Temp. Talbot, p. 61, A., being a joint tenant with B. her sister, made an absolute conveyance to C. in fee for 104*l.*, which was admitted to be intended only as a mortgage. Some time after, in 1708, those deeds were cancelled, and then A., in consideration of 184*l.*, including the 104*l.* paid by C., conveyed the estate in manner as before, but with a further covenant, not to agree to any partition without C.'s consent. B. was in possession till 1710, when C., ejecting her out of one moiety, enjoyed it quietly till 1726, at which time A. brought a bill for redemption, to which C. pleaded himself an absolute purchaser. In accounts between the parties, the money was stated as purchase-money. In 1710, there was an agreement that A. might have the estate again if desired, on payment of principal, interest, and charges. The cause was first heard before the Master of the Rolls, who dismissed the bill: it then came on before Lord *Talbot*, who observed, the case was very dark; the first deed was admitted to be a mortgage, the second was made in the same manner, excepting the covenant respecting the partition, which was the darkest part of the case; for, to suppose that it was an absolute conveyance, and to take a covenant from one who had nothing to do with the estate, made both the covenant and parties vain and ridiculous; but that it would be equally so, if the deed was supposed not

FREEHOLDS, LEASEHOLDS, AND COPY-HOLDS.

hereinbefore contained; and while the said [*mortgagor*], his heirs, executors, or administrators, shall duly pay and

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to be an absolute conveyance; so that it was of no great weight, and ought to be laid out of the question. That he was inclined, upon the whole, to think the conveyance, in 1708, was at first an absolute conveyance; the agreement in 1710 for the repurchase, shewed it was not redeemable at first; the acquiescence of sixteen years upon C.'s possession was strong evidence of it. Had A. continued in possession any time after the execution of the deeds, he should have been clear that it was a mortgage; but she was not. His Lordship therefore affirmed the decree. In the case of *Tasburgh* v. *Echlin*, 2 Bro. Par. Ca. 265, Toml. ed., Sir John Eustace being seised in fee (expectant on a term of which forty-three years were unexpired,) of the premises in question, which were (in possession) of the clear yearly value of 200*l.*, in consideration of 200*l.* paid him by John Tasburgh, by lease and release, in May, 1681, conveyed them to Charles Tasburgh, and his heirs, in trust for John Tasburgh. In the release there was a proviso, that if Sir John Eustace, his heirs, &c. should pay to Charles Tasburgh, his executors, &c. at the end of five years, 200*l.* with full interest at 10*l. per cent.*, then it should be lawful to him and his heirs to re-enter. But if Sir John, his heirs, &c, should fail in payment of the money, with interest at the time limited, then the estate of Charles Tasburgh should be absolute, as well in equity as in law; and that Sir John, his heirs and assigns, should, on failure of payment as aforesaid, be for ever debarred from all right and relief in equity, against the tenor of the said indenture of release; and Sir John thereby released unto Charles Tasburgh, his heirs and assigns, for ever, all his right in equity to redeem, in case of failure of payment. There was no covenant to repay the 200*l.* or interest. The five years elapsed, and the money not having been paid, John Tasburgh filed a bill against him, Sir John Eustace, in the Court of Chancery of Ireland, praying payment, or that the conditional estate of Charles Tasburgh in the premises, in case it should be adjudged to be a defeasible or redeemable estate, should be made absolute; and that, in such case, Sir John Eustace might be foreclosed of all right or equity of redemption, and might make farther absolute conveyances. Sir John being served with a *subpœna* to answer this bill, stood out all process of contempt to a sequestration, and never having put in his answer, a decree was made that he should be foreclosed, unless the principal, interest, and costs, were paid on the 11th December, 1689. Sir John Eustace lived till 1706, without seeking to impeach the decree. In 1723, the co-heirs of Sir John Eustace filed a bill against Henry Tasburgh, the heir of John, praying a reversal of the decree of foreclosure, as being obtained by surprise and fraud; Henry Tasburgh insisted on his title, pleading the lease

perform the several rents, covenants, fines, suits, and services hereinbefore covenanted by him to be paid and

and release in 1681, the decree of foreclosure, and acquiescence. But the Court decreed in favour of the plaintiff upon payment of principal, interest, and costs. Against this decree Henry Tasburgh appealed to the House of Lords of England, insisting that there ought to be no redemption upon any terms whatever, it being expressly agreed by the release, that if the money was not paid within five years, the estate should be irredeemable; it ought, therefore, to be considered as a conditional purchase, and the rather, because there was no covenant on the part of Sir John Eustace to pay the money; that as the appellant Tasburgh, or those under whom he claimed, could not compel payment, it ought not to have been decreed a mortgage, for, in cases of mortgages, the remedy should be reciprocal; consequently, no equity of redemption could arise or spring from the condition contained in the release; and insisting also on the adequacy of the consideration-money, and the long acquiescence. The decree was reversed, and it was ordered, that the respondent's bill should be dismissed.

Effect of recognition of instrument as a mortgage.

But, however strongly the contents of the instrument itself, or intrinsic facts, may favour the supposition that the parties had an actual purchase in contemplation; yet, if in subsequent dealings between them, and particularly in a written document, the relationship of mortgagor and mortgagee has been treated as subsi sting between the parties, this, of course, conclusively determines the character of the transaction, and precludes any other construction of the instrument.

Thus, in *Sevier* v. *Greenway*, 19 Ves. 413, where the bill stated a mortgage for one thousand years to secure 80*l.*, which, by assignments, became vested in the defendant G.; and a conveyance made in 1799, reciting the mortgage and assignments, and that G. had lent the plaintiff, then entitled to the equity of redemption, the farther sum of 50*l.*, and had contracted to purchase the property in mortgage at 150*l.*; out of which the defendant was to retain the 80*l.* and 50*l.*; and declaring, that the plaintiff granted and released the premises to the defendants, and their heirs and assigns, to the use of M. during the life of G., in trust for G., with remainder to G. and his heirs, subject to a proviso, that if the plaintiff should, within two years, be minded to purchase the premises, and should pay to the defendant G. 150*l.*, with lawful interest to the time of payment, then the defendants should reconvey the premises. The bill farther stated articles of agreement made the 11th January, 1800, reciting that the plaintiff was entitled to and possessed of the premises, being very much out of repair; and that not having power to repair the same, he had applied to the defendant G. to cause the same to be repaired at his own expense; and de-

FREEHOLDS, LEASEHOLDS, AND COPY-HOLDS.

performed, it shall be lawful for the said [*mortgagor*], his heirs, executors, administrators, and assigns, to hold and

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claring, that it should be lawful for the defendant G. to expend such sums of money as should be necessary to repair the same; and to let the same, and to retain the rents for his reimbursement, until his expenses, with lawful interest, should be paid; the plaintiff, who had been tenant in tail, agreeing to levy a fine of the premises, and G. covenanting to repair the premises *standing upon mortgage*, and, on being re-imbursed the amount of the repairs, to deliver up the articles of agreement to be cancelled. By agreement made on the 12th August, 1800, reciting that G. had expended 40*l.* in repairing part of the premises, and that the plaintiff had applied to him to repair the remainder, and to lend the plaintiff the farther sum of 10*l.*, it was witnessed, that, in consideration of the 10*l.* lent, the plaintiff covenanted that he would cause the tenants to quit the premises wanting repairs, so that G. might enter on and repair the same; and that G. should let the same, and receive the rents, until he should be re-imbursed the 40*l.*, 10*l.*, and all sums to be laid out, with interest; that the plaintiff should not meddle with the letting the premises, or receiving the rents, until G. should be fully paid; that the agreement should be subject to the proviso contained in the indenture of November, 1799, and that the plaintiff should not be at liberty to re-purchase until payment of the 160*l.*, and the farther sums and expenses, with interest. The bill prayed the usual accounts, as upon mortgage and a redemption. The defendant G., by his answer, admitting the instruments, insisted on his right as purchaser. Sir *William Grant*, M. R.—"*If this had rested upon the conveyance of* 1799, *possession being taken, I do not see why it should be considered otherwise than as a sale.* Much stress, however, need not be laid upon the circumstances relating to the taking possession; the agreement of January, 1800, precludes that question, providing that a fine shall be levied of the premises expressed to be 'standing upon mortgage;' and the third instrument goes farther, providing for a further loan of 10*l.* I shall therefore decree upon this as a mortgage." See also 2 Sch. & Lef. 293.

Alleged distinction in regard to rent-charges.

It remains to be observed, that the doctrine "once a mortgage always a mortgage," (as it has been tersely expressed), has, in some early cases, been considered as applying with less force to the case of the mortgage of a rent-charge than in other cases. Thus, in *Floyer* v. *Lavington*, 1 P. W. 268, where J. S. granted a rent-charge of 48*l.* a-year in fee to B., upon condition, that, if J. S. should, at any time, give notice to pay in the consideration-money, being 800*l.*, by instalments, namely, 100*l.* at the end of every six months, and should, pursuant to such notice, pay the same, and interest, at any time during his life, then the grant to be void: there was no covenant for J. S. to pay the money, and the rent-charge

enjoy the said freehold, leasehold, and copyhold —— and premises, respectively hereby released, demised, and cove-

FREEHOLDS, LEASEHOLDS, AND COPY-HOLDS.

was much less than what the interest came to; B. had conveyed it over, after J. S.'s death, to a purchaser, with a collateral security for quiet enjoyment, and the purchaser had afterwards made a marriage settlement upon it. The question was, whether it was redeemable after sixty years. It was decreed by Lord *Cowper* that it was not. He observed, it was material that, at the time of making the mortgage, interest was at 8*l. per cent.;* the rent-charge, therefore, was much less than the interest of the money; consequently, the payment of the rent-charge could not be taken as the payment of the interest. That several circumstances concurred in this case, which, though each of them singly might not be of force to bar the redemption, yet, joined together, were strong enough to prevail over it; that the mortgagee seemed to have allowed a consideration for purchasing the equity of redemption, after the death of the mortgagor: 1st. By taking the rent of 48*l. per annum;* 2nd. By agreeing to have his money by instalments; 3rd. By leaving it only at the election of the mortgagor, whether he would redeem it or not: that there could be no reason given why such a contingent right of redemption might not, upon fair and equitable terms, be purchased. Length of time, when so great as in this case, was a good bar of redemption of a rent-charge, as well as of land*, and the mortgagor was not bound to pay the money by any covenant.

The ground of decision to which this case has been here referred, was more distinctly recognised in the case of *Mellor* v. *Lees*, 2 Atk. 494, where a mortgage was made of an estate by the plaintiff's grandfather, T. M., in 1689, to J. and Js. Whitehead. Afterwards, on the 5th of June of the same year, the Whiteheads mortgaged the same estate to C. and W. and their heirs, for securing 200*l.*, to which T. M. and his son John were parties. C. and W., in order to secure themselves the interest, made a lease to the plaintiff's father and to his assigns, dated 12th June, 1689, for five thousand years, at the rate of 12*l.* a-year for the first three years, and 10*l.* a-year for the remainder of the term; and if, in the space of three years, the 200*l.* was paid, with interest, then the premises were to be reconveyed. Receipts had been given, sometimes for interest and sometimes for a rent-charge. The last receipt was in 1730. The 200*l.* was money lent under one Sutton's will in 1687, and directed to be laid out in the purchase of lands in fee in Lancashire or Cheshire; the rents to be applied towards clothing twenty-four aged and needy housekeepers. The estate, at the time of the mortgage, was worth 500*l.* only, but was then valued at 900*l.* The plaintiff, on the 20th January, 1738, had given no-

* *Vide ante*, p. 380.

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS.

nanted to be surrendered, or otherwise assured, or intended so to be, with their appurtenances; and to receive and take the rents and profits thereof for his and their own use and benefit, without any interruption or denial from or by the said [*mortgagee*], his heirs, executors, administrators, and assigns, or of, from, or by any other person or persons lawfully claiming, or to claim, through, under, or in trust for him or them, any thing hereinbefore contained to the contrary thereof in anywise notwithstanding (*i*).

Recital of agreement for the appointment of a receiver.

And whereas, upon the treaty for the loan of the said sum of £——, it was agreed that the regular payment of the interest thereof, so long as the same should remain

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tice that he would pay in the money; but the defendant, a new trustee of the charity, had refused to take it, insisting that it was an absolute purchase: it was so decreed by the Master of the Rolls. Upon an appeal to Lord *Hardwicke*, he said, the bill was properly dismissed, not so much upon general rules, as upon the particular circumstances of the case, and the likeness there was between this case and *Floyer* v. *Lavington*. His Lordship admitted, that if any fetters had been laid upon redeeming the mortgaged estate by some original agreement, either in the mortgage deed or a separate deed, it would not avail, where it was done with a design to wrest the estate fraudulently out of the hands of the mortgagee. But where was the fraud or inconvenience in the present case? The land itself was not parted with; but it was merely selling a rent-charge, strictly adequate to the consideration given; and instead of having a chance for the whole estate, the lender of the money was content to buy the interest for ever by way of rent-charge.

There seems, however, to be no very solid ground for distinguishing a mortgage of a rent-charge from that of land, in regard to the admissibility of restrictions on the power of redemption; and as in both the cases which are supposed to have turned upon this distinction, the lapse of time was such as, upon the general rules of the Court, would have been a bar to the right of redemption, they are not to be relied upon as establishing it.

(*i*) If there is a trust for sale, add—

Variation where there is a trust for sale.

"Provided, nevertheless, that nothing in the proviso or declaration lastly hereinbefore contained shall extend to prejudice or affect any purchaser or purchasers claiming under or by virtue of the trust for sale hereinbefore contained."

upon this security, should be further secured by the appointment of a receiver, in manner hereinafter expressed. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, the said [*mortgagor*] and [*mortgagee*] *Do*, and each of them *Doth* hereby depute, constitute, and appoint the said [*receiver*], to be receiver, agent, and attorney of the said [*mortgagor*] and [*mortgagee*], and each of them, in the names or name of them, or either of them, or otherwise, to ask, demand, and receive of and from all the present and future tenants and occupiers of the several freehold, leasehold, and copyhold —— and hereditaments respectively hereby released, demised, and covenanted to be surrendered, or intended so to be, all the yearly rents, issues, and profits now due, and to become due, for or in respect of the same premises; and in default of payment thereof, to use and exercise all such remedies, by entry, distress, or otherwise howsoever, and generally to do and perform all such other acts, as shall be requisite or expedient for the receiving and recovering of the said rents, issues, and profits. AND the said [*mortgagor*] and [*mortgagee*] respectively do hereby direct and require the several tenants and occupiers aforesaid, to pay unto the said [*receiver*] all the yearly rents and reservations due and to become due from them respectively, for the said premises, or any part thereof, and hereby declare that the receipts of the said [*receiver*] shall be effectual discharges for the same. AND *it is hereby declared and agreed*, that the said rents, issues, and profits, when so received, shall be applied and disposed of by the said [*receiver*] in manner following, that is to say, in the first place, in paying and discharging all taxes, rates, and outgoings, payable in respect of the said premises; and in the next place, in retaining and satisfying all necessary and reasonable expenses attending the collecting, receiving, or getting in the said rents, issues, and profits; and also a salary, after the rate of £—— *per annum*, for his time and trouble, for so long a time as he shall be continued receiver for the purposes aforesaid; and in the next place, in paying and satisfying unto the said [*mortgagee*], his executors, administrators, or assigns, the interest to accrue

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS.

Further *testatum*.

Mortgagor and mortgagee appoint receiver.

Rents, how to be applied.

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS.

due in respect of the said sum of £——, by equal half yearly payments, on the said —— day of —— and —— day of ——, in every year, clear of all deductions for taxes or otherwise; and in case, after making the several payments aforesaid, there shall be any residue or surplus of such rents and profits, then (subject and without prejudice to the right of the said [*mortgagee*], his executors, administrators, or assigns, to have such residue or surplus applied in or towards payment of the principal of the said mortgage debt,) the same shall be paid by the said [*receiver*] to the said [*mortgagor*], his heirs, executors, administrators, or assigns, according to the nature and quality thereof, or as he or they shall direct, for his and their own use and benefit. And the said [*receiver*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*mortgagee*], his executors, administrators, and assigns; and also separately and distinctly with the said [*mortgagor*], his heirs, executors, administrators, and assigns, that the said [*receiver*] shall and will, from time to time, so long as he shall be continued receiver or attorney for the purposes aforesaid, duly pay, apply, and dispose of the rents, issues, and profits, which shall be received by him as aforesaid, for the purposes and in manner hereinbefore mentioned, and according to the true intent and meaning of these presents. And the said [*mortgagor*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*mortgagee*], his executors, administrators, and assigns, that in case the said [*receiver*], or any future receiver or receivers to be appointed under this present provision, shall at any time or times, so long as the said sum of £——, or the interest thereon, or any part thereof respectively, or any other of the monies hereby intended to be secured, shall continue charged upon the said hereditaments and premises, die, or become unwilling or unable to act as such receiver, attorney, or agent, as aforesaid, then, and so often as the same shall happen, the said [*mortgagor*], or his heirs, executors, administrators, or assigns, shall and will, within the space of one calendar month next thereafter, appoint and authorize, or join and

Covenant by receiver to apply same accordingly.

Covenant by mortgagor to concur in new appointment of receiver.

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS.

concur with the said [*mortgagee*], his heirs, executors, administrators, or assigns, in appointing and authorizing; And in default thereof, it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, without the concurrence of the said [*mortgagor*], his heirs, executors, or administrators, to appoint and authorize some other fit and proper person, to be approved of by the said [*mortgagee*], his executors, administrators, or assigns, to be receiver, agent, and attorney, in the place of the receiver, agent, or attorney, so dying, or becoming unwilling or unable to act as aforesaid, for the purposes aforesaid; and every such person to be so appointed shall be entitled to exercise all the powers and authorities hereinbefore given to the said [*receiver*]: *And also* that so long as the said sum of £——, or the interest thereon, or any other of the monies hereby intended to be secured, or any part thereof respectively, shall continue charged on the said hereditaments and premises, the said [*mortgagor*], his heirs, executors, or administrators, shall not nor will revoke or alter the appointment hereby made, or any future appointment or appointments of a receiver, to be made under the provisions hereinbefore contained, without the consent in writing of the said [*mortgagee*], his executors, administrators, or assigns, first obtained for that purpose; nor receive or collect any of the rents, issues, or profits of the said premises; or in anywise prevent or obstruct the said [*receiver*], or any such future receiver or receivers as aforesaid, in or from receiving the same, or any part thereof. And *it is hereby further declared and agreed*, that the said [*receiver*], or any future receiver to be appointed as aforesaid, shall not be answerable or accountable for any misfortune, loss, or damage, which may happen in or about the execution of his office of receiver, unless the same shall happen by or through his own wilful act, neglect, or default. *Provided, nevertheless, and it is hereby further declared and agreed*, that it shall not be lawful for the said [*receiver*], or any future receiver to be appointed as aforesaid, to act in the execution of his office of receiver, unless or until default shall be made in payment of the said principal sum of £——, and interest, or

And in default, that mortgagee may appoint.

Not to revoke appointment without consent of mortgagee.

Indemnity to receiver.

Receiver not to act until default.

FREEHOLDS, LEASEHOLDS, AND COPYHOLDS.

some part thereof respectively (*k*); but no such tenant or tenants, occupier or occupiers as aforesaid, shall be bound to take notice of this present proviso or declaration. IN WITNESS, &c.

Variation.

(*k*) Or, if the principal is to remain a given time on the security, and the interest is payable in the mean time half yearly, say—

"in payment of some or one of the said half yearly payments of the interest of the said principal sum of £——."

APPOINTMENT IN FEE, WITH SPECIAL CLAUSES.

MORTGAGE *in* FEE *by* APPOINTMENT *to a* TRUSTEE *for Mortgagee;* COVENANT *by* MORTGAGEE NOT TO CALL *in* PRINCIPAL MONEY *for a given Period, the* INTEREST *being* PUNCTUALLY PAID; *also by* MORTGAGOR NOT *to* PAY OFF *Principal Money until such Time;* POWER *of* DISTRESS *for Recovery of the* INTEREST.

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*mortgagor*], of &c., of the first part; [*mortgagee*], of &c., of the second part; [*trustee*], of &c., of the third part. *(Recite conveyance to mortgagor to uses to prevent dower).*

Recital of agreement for loan.

AND WHEREAS the said [*mortgagee*] hath, at the request of the said [*mortgagor*], agreed to lend and advance to him the sum of £—— at interest, on the security of a mortgage of the said —— and hereditaments; and it hath been agreed that the said hereditaments shall be conveyed unto and vested in the said [*trustee*], as a trustee for and on the behalf of the said [*mortgagee*].

Testatum.

NOW THEREFORE THIS INDENTURE WITNESSETH, that, in consideration of the sum of £—— of lawful money of Great Britain and Ireland, lent and advanced by the said [*mortgagee*] to the said [*mortgagor*], at or before the execution of these presents, the receipt of which said sum the said [*mortgagee*] doth hereby acknowledge, and from the same sum and every part thereof doth acquit,

release, and for ever discharge the said [*mortgagee*], his heirs, executors, administrators, and assigns; And also in consideration of 10*s.* of like lawful money at the same time paid by the said [*trustee*] to the said [*mortgagor*], the receipt whereof is hereby also acknowledged, the said [*mortgagor*], in exercise and execution of the aforesaid power or authority reserved to him by the said hereinbefore in part recited indenture of release, and of all other powers and authorities in anywise enabling him in this behalf, *Doth* hereby direct, limit, and appoint, that ALL THAT, *(describe parcels)*, together with all the rights, members, and appurtenances, to the said hereditaments and premises, or any part thereof, belonging or appertaining, shall henceforth remain and be TO THE USE of the said [*trustee*], his heirs and assigns, for ever, *In trust* for the said [*mortgagee*], his executors, administrators, and assigns, subject nevertheless to the proviso or condition for redemption hereinafter contained, (that is to say), PROVIDED ALWAYS, and these presents are upon this express condition, that if the said [*mortgagor*], his heirs, executors, or administrators, shall pay unto the said [*mortgagee*], his executors, administrators, or assigns, the sum of £——, with interest for the same, at the rate of 5*l. per cent. per annum*, from the day of the date of these presents, on the —— day of —— next ensuing, between the hours of one and two of the clock in the afternoon, at the dwelling-house of the said [*mortgagee*], in —— street, in the parish of ——, in the city of ——(*a*), without any deduction or abatement whatsoever,

APPOINTMENT IN FEE, WITH SPECIAL CLAUSES.

Proviso for redemption.

(*a*) The mention of a place of payment is made for the convenience of the mortgagor; for, otherwise, as the mortgage-money is a sum in gross, and not issuing out of the land, (in which respect it differs from a rent, see Co. Litt. 210. b.; also Marchioness of *Lansdowne* v. Marquis of *Lansdowne*, 2 Bligh's Parl. Cas. 95), tender upon the land is not sufficient; but the mortgagor must seek out the mortgagee, and make the tender to him personally, unless, it seems, he be out of the kingdom; whereas, if a place of tender be appointed, it is sufficient for him to tender it at the place; and if a time of the day be specified, (as, between twelve and two in the afternoon), it will be enough for the mortgagor to wait during those hours. Co. Litt. 212. a. Where, however, a power of sale is given in default of payment, it seems advisable not to name a place, to prevent the possibility of the estate of the mortgagee ceasing without his knowledge, to the

As to naming a *place* of payment in the proviso.

APPOINTMENT IN FEE, WITH SPECIAL CLAUSES.

then and immediately thereupon these presents, and every clause, matter, and thing herein contained, shall cease, determine, and be absolutely void, any thing hereinbefore contained to the contrary notwithstanding. And the said [*mortgagor*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*mortgagee*], his executors and administrators, that he the said [*mortgagor*], his heirs, executors, or administrators, will pay unto the said [*mortgagee*], his executors or administrators, the sum of £—— of lawful money of Great Britain and Ireland, with interest for the same, at the rate of 5*l. per centum per annum*, from the day of the date of these presents, on the —— day of —— next ensuing, between the hours of one and two of the clock in the afternoon, at the dwelling-house of the said [*mortgagee*], in —— street, in the parish of ——, in the county of ——, without any abatement or deduction whatsoever (*b*). (*Covenants with the trustee for title*, ut ante, p. 263). And the said [*mortgagee*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*mortgagor*], his heirs, executors, and administrators, that in case the said [*mortgagor*], his heirs, executors, or administrators, shall duly and regularly pay the interest on the said principal sum of £—— half yearly, on the —— day of —— and the —— day of —— in every year, while the said principal sum shall remain owing upon this security, or within one calendar month after the said respective days of payment as aforesaid, then that he the said [*mortgagee*], his executors or administrators shall not nor will call in or require payment of the said principal sum, until the expiration of the period of seven years from the day of the date of these presents, nor will the said [*mortgagee*], his heirs, executors, or administrators, commence or institute

Covenant by mortgagor to pay mortgage-money.

Covenant by mortgagee not to call in mortgage-money for seven years, the interest being punctually paid.

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prejudice of purchasers. Indeed, in such cases, the redemption clause is more usually framed as an agreement for a reconveyance, than a proviso for the cesser of the estate, in order to protect purchasers against such a consequence.

(*b*) It is more convenient, for the purposes of pleading, that the covenant should be complete in itself, and not, (as it usually is), referential to the proviso for redemption.

APPOINTMENT IN FEE, WITH SPECIAL CLAUSES.

any proceedings at law or in equity, to enforce the payment of the said principal sum, or to obtain possession of the said hereditaments, or foreclose the equity of redemption thereof; but, in case default shall be made by the said [*mortgagor*], his heirs, executors, or administrators, in payment of the said interest money within one calendar month after any or either of the said half yearly days of payment, it shall be lawful for the said [*mortgagee*], his heirs, executors, or administrators, to pursue and prosecute all or any of his or their remedies, as a mortgagee or mortgagees of the said hereditaments, or otherwise, by virtue of these presents, in the same manner as if this present covenant had not been made. AND the said [*mortgagor*], for himself, his heirs, executors, and administrators, doth hereby covenant with the said [*mortgagee*], his executors and administrators, that he the said [*mortgagor*], his heirs, executors, or administrators, shall not nor will pay or tender the said principal sum of £—— to the said [*mortgagee*], his heirs, executors, administrators, or assigns, nor institute any suit or proceedings in equity to enforce or compel the redemption of the said hereditaments, until the expiration of the said period of seven years from the date hereof(*c*); And if the said [*mortgagee*], or the said

—by mortgagor not to pay off mortgage-money before seven years.

(*c*) It should seem, upon the general principles of law applicable to contracts, that a proviso for redemption postponing the payment of the principal money in a mortgage to a distant day, is binding as well on the mortgagor as the mortgagee, preventing the former from compelling the receipt, as well as the latter from enforcing payment, before the day appointed. A contrary doctrine, however, is advanced by an able text writer on the subject of mortgages, (see Coote on Mortg. p. 32; also Cov. Pow. Mortg. 136, n.), who seems to consider that such a proviso is not mutually obligatory, but is restrictive of the mortgagee's right of foreclosure only, and not of the mortgagor's power of redemption; and he cites the following position from Vernon, as applicable to the point:—"If I lend 100*l.* upon mortgage, with a proviso to redeem on the payment of 112*l.* at the end of two years, there, one side cannot foreclose till the end of two years; but, if the mortgagor come at the end of the first year, and offer to pay the 112*l.*, he shall be admitted to the redemption." See 1 Vern. 395. And upon this principle the case of *Talbot* v. *Braddill*, 1 Vern. 183, 395, is considered to have been decided. That case was as follows:—The plaintiff

Whether mortgagor can pay off debt before the time named in the proviso for redemption.

APPOINTMENT IN FEE, WITH SPECIAL CLAUSES.

[*mortgagor*], or their respective heirs, executors, or administrators, shall institute any action or suit at law or in equi-

being seised in possession of lands of 15*l. per annum*, and in reversion, after the death of his mother, of other lands of about 17*l. per annum*, and of other lands, after a term of twenty-six years to come, of 8*l. per annum*, (which estate was subject to incumbrances), did, by deed and fine, in March, 1657, in consideration of 320*l.*, demise those lands to the defendant for ninety-nine years, at 5*s. per annum* rent, upon condition that, if the plaintiff or his heirs should pay the defendant 380*l.* on the 25th of March which should be in the year 1688, then the conusees should stand seised to the use of the plaintiff and his heirs; and the plaintiff covenanted for the defendant's enjoyment accordingly. In 1682, (twenty-five years after the conveyance), the plaintiff filed his bill to be admitted to redeem, and for an account of the profits from the date of the deed, alleging, that though the deed was in that form, yet it was, nevertheless, agreed between him and the defendant that it should be a mortgage, and redeemable at any time, upon payment of 320*l.* and interest; and, though there was no other proof of any other agreement than the deed, and there was a bond to perform the covenants of the deed, and although it appeared that the estate consisted much in old buildings and a mill, and that the defendant had laid out above 100*l.* in repairs, yet, in regard the plaintiff's mother had died within three years after the deed, whereby the income had exceeded the interest of the money, the Lord Keeper, notwithstanding there was a contingency at the time of the deed, thought this an unreasonable bargain, and decreed an account of the profits *ab origine*, and a redemption on payment of what the profits fell short of the 320*l.* and interest, and appointed the same to be paid at a day certain, and not to wait until 1688, according to the condition of the deed.

It will be observed that, in this case, an agreement was alleged, independently of the proviso for redemption, to redeem *at any time*, on payment of principal and interest; and the Court, in decreeing redemption, appears to have acted upon this agreement, without reference to the clause in the deed, which provided for the redemption or repurchase of the property, upon terms altogether different, namely, the payment of a specific sum, not corresponding with the amount of principal and interest; the grantee was also to enjoy the rents in the meantime; so that, upon the face of the deed alone, (which was accompanied by actual possession), the transaction was evidently a defeasible purchase, and not a mortgage; and the Court relieved against it as an "unreasonable bargain." In the hypothetical case, too, cited by Mr. Coote from Vernon's Reports, it is observable that the 112*l.*, on payment of which the mortgagor was to be admitted to redeem before the time appointed by the proviso, *was the whole*

ty against the other of them, his heirs, executors, or administrators, contrary to the covenant hereinbefore contained, such covenant shall or may be pleaded and shewn in bar thereto. And for the better securing the payment of the interest of the said principal sum of £—— (*d*), the said

APPOINTMENT IN FEE, WITH SPECIAL CLAUSES.

Power of distress for the recovery of interest.

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sum to which the mortgagee would have been entitled at the more distant day so appointed; and, therefore, the case affords no authority for the doctrine, that a mortgagee, whose money is by the proviso payable at a future day, with interest in the meantime, can be compelled to receive it at an earlier day, (after notice), *with interest merely up to the time of payment;* and the Statute of Usury, (12 Ann. stat. 2, c. 16, s. 1), would, it may be contended, prevent him from receiving interest beyond the time of the actual repayment of the principal, (provided it would increase the amount of the interest, during the continuance of the loan, to more than *5l. per cent.*), even if the mortgagor were disposed to redeem on such disadvantageous terms. It is submitted, therefore, that the case of *Talbot* v. *Braddil*, and the hypothetical case cited from Vernon, are very inconclusive authorities for the doctrine in question, and that it is altogether untenable in principle. To prevent, however, any question upon the point, probably the cautious practitioner will choose expressly to negative the mortgagor's right of redemption before the arrival of the day fixed by the proviso; and then, the intention of the parties being apparent, if such a proviso be held to be inoperative, it must be upon the principle that a mortgagor is incapable of restraining his right to redeem *before* a certain period, in the same manner as we have seen he is incapable of restraining his power of redemption *after* a certain period, (*vide ante*, p. 510): but the two cases are essentially different; and the Court, in imposing on a mortgagor the necessity of giving six months' notice previously to the payment of the money, has recognised the principle, that an immediate right to redeem is not necessarily incident to a mortgage. It is not improbable, indeed, that, if the point had come before a Court of equity a century ago, when the attention of the Judges who presided there was so anxiously directed, in transactions between mortgagor and mortgagee, to protecting the needy debtor from the rapacity of his creditor, as almost entirely to lose sight of the maxim, *modus et conventio vincunt legem*, the doctrine under consideration might have obtained a more ready countenance than it would now receive, when the Courts, acting upon more enlarged views, are disposed to allow greater scope to the principle expressed in this maxim.

(*d*) It is often convenient in mortgages to give a power of distress for the recovery of the interest, particularly where the property is in the occupation of the mortgagor himself, and not of a tenant paying rent. The object is sometimes effected by making a demise at will to the mortgagor,

As to giving a power of distress for recovery of interest.

APPOINTMENT IN FEE, WITH SPECIAL CLAUSES.

[*mortgagor*], and also the said [*trustee*], at the request and by the direction of the said [*mortgagor*], do respectively hereby grant unto the said [*mortgagee*], his executors, administrators, or assigns, that as often as it shall happen that the interest of the said principal sum of £—— shall be in arrear, in the whole or in part, for the space of —— days after any of the days hereinbefore appointed for payment of the same, it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, into and upon the —— and premises hereby appointed, or otherwise assured, or intended so to be, or into and upon any part of the same in the name of the whole to enter, and distrain for the same interest, and the arrears thereof, and the distress and distresses then and there found to impound, and in pound to detain, and in due time to appraise and dispose of the same according to the due course of law, in the same manner in all respects as landlords are, by act of Parliament or otherwise, authorized to do in respect to distresses for arrears of rent reserved upon leases for years; to the intent that the said [*mortgagee*], his executors, administrators, or assigns, shall, by the same distress or distresses, be paid and satisfied all arrears of the said interest, and all costs occasioned by the non-payment thereof(*e*). IN WITNESS, &c.

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reserving a rent equal to the amount of the interest; (see a form to this effect, Cov. Preced. Mortg. 94); but a power of distress, (of the validity of which no doubt can be entertained, *vide ante*, Vol. 4, p. 275), is to be preferred, inasmuch as a demise at will is liable to be determined by the death and at the will of either party, and, it is conceived, subjects the deed to a lease stamp.

Utility of warrant of attorney in ejectment.

(*e*) In order to facilitate the recovery of the possession of the mortgaged property by the mortgagee, in case of default in payment of the mortgage-money, a warrant of attorney to confess judgment in ejectment is sometimes given; and this (similarly to the power of distress for securing the interest), is the more requisite when the mortgagor himself is in the occupation; for, if it is in the occupation of a tenant holding under a subsisting demise, the only effect of the mortgagee's proceeding by ejectment would be to enable him to get into possession of the rents, which he might do by notice to the tenant merely. The following precedent of such a warrant of attorney, it will be perceived, is unconnected with the mortgage precedent in the text.

WARRANT *of* ATTORNEY *to confess Judgment in Ejectment.*

TO ——, and ——, Attornies of his Majesty's Court of King's Bench, at Westminster, jointly and severally, or to any other Attorney of the same Court.

THESE are to desire and authorize you, the attornies above named, or any one of you, or any other attorney of the Court of King's Bench aforesaid, to appear for me [*mortgagor*], of &c., in the said Court, as of —— term last past, —— term next, or any other succeeding term; and then and there to receive a declaration for me in an action of trespass and ejectment, at the suit of *John Doe*, on the demise of [*mortgagee, or his trustee, as the case may be*], for two messuages, three outhouses, two yards, two gardens, and one rood of land, with the appurtenances, in the parish of ——, in the county of ——; which the said [*mortgagee or trustee*] had demised to the said *John Doe*, for the term of —— years from —— ; and thereupon to confess the same action, or else to suffer judgment by *nil dicit*, or otherwise, to pass against me in the said action, and to be thereupon entered up forthwith against me of record in the same Court, for the recovery of the said term yet to come of and in the said tenements, and also for the recovery of £—— damages, besides costs of suit. And I the said [*mortgagor*] do hereby further authorize and empower you the said attornies, or any one of you, or any other attorney as aforesaid, after the said judgment shall be so entered up as aforesaid, for me, and in my name, and as my act and deed, to sign, seal, and execute a good and sufficient release or releases in the law to the said *John Doe*, and the said [*mortgagee or trustee*], or either of them, their, or either of their heirs, executors, administrators, or assigns, of all and all manner of error and errors, writ and writs of error, and all benefit and advantage thereof, and all misprisions of error and errors, defects and imperfections whatsoever, had, made, committed, done, or suffered, or to be had, made, committed, done,

WARRANT OF ATTORNEY IN EJECTMENT.

or suffered, in, about, touching, or concerning the aforesaid judgment, or in, about, touching, or concerning any writ, warrant, process, declaration, plea, entry, or other proceeding whatsoever, of or in anywise concerning the same: And for what you the said attornies, or any one of you, shall do, or cause to be done in the premises, or any of them, this shall be to you, or any of you, a sufficient warrant and authority. IN WITNESS, &c.

DEFEAZANCE.

DEFEAZANCE TO WARRANT OF ATTORNEY IN EJECTMENT.

WHEREAS, by indentures of lease and release, bearing date respectively, the lease the day before, and the release even date with the above-written warrant of attorney, and respectively made between the said [*mortgagor*] of the one part, and the said [*mortgagee*] of the other part, in consideration of the sum of £——, lent and advanced by the said [*mortgagee*] to the said [*mortgagor*], the said [*mortgagor*] hath granted, released, conveyed, and assured unto the said ——, his heirs and assigns, certain messuages, &c., situate, lying, and being in the said parish of ——, in the county of ——, now in the occupation of the said [*mortgagor*]; *To hold* the same unto and to the use of the said [*mortgagee*], his heirs and assigns, subject to a proviso or condition in the said indenture of release contained, for the redemption of the same premises on payment by the said [*mortgagor*], his heirs, executors, administrators, or assigns, unto the said [*mortgagee*], his executors, administrators, or assigns, of the sum of £——, with interest for the same at the rate of five pounds *per cent. per annum*, on the —— day of —— next ensuing, at the common dining-hall &c., without any deduction or abatement whatsoever. NOW IT IS HEREBY DECLARED, that the judgment so to be entered up against the said [*mortgagor*], in pursuance of the above-written warrant of attorney, is intended and agreed to be a further security to the said [*mortgagee*], his executors, administrators, and assigns, for the said principal sum of £——, and interest, secured by the hereinbefore recited indenture of release; and that no execution or executions shall be issued or taken out upon the said judgment, un-

WARRANT OF ATTORNEY IN EJECTMENT.

less and until default shall be made in payment of the said principal sum and interest, or some part thereof respectively, on the day or time mentioned and appointed for payment thereof as aforesaid; and that in case and when such default shall be made as aforesaid in payment of the said principal sum and interest, or any part thereof*, then, and in such case, it shall be lawful for the said [*mortgagee*], his heirs, executors, administrators, or assigns, to sue out execution or executions upon or by virtue of the said judgment, for the recovery of the possession of the said hereditaments. And it is further declared and agreed, that it shall not be necessary for the said [*mortgagee*], his heirs, executors, administrators, or assigns, to revive, or cause to be revived the said judgment, although the same shall have been entered of record for the space of one year and upwards; and that the said [*mortgagor*], his heirs, executors, and administrators, shall not nor will have, receive, or take any plea, exception, proceeding, or other benefit, from the omission of the said [*mortgagee*], his heirs, executors, administrators, or assigns, to keep on foot or revive the said judgment, although the same shall have been entered for the space of one year or upwards; and that if the said [*mortgagee*], his heirs, executors, or administrators, shall attempt so to do by action or other legal proceeding or proceedings whatsoever, this present agreement shall and may be pleaded or shewn in bar thereto, any rule or practice of the courts, or any of them, to the contrary thereof in anywise notwithstanding. As WITNESS the hands of the parties the day and year above written.

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* Add, if so intended—

Variation as to notice.

" and the said [*mortgagee*], his heirs, executors, or administrators shall have given to the said [*mortgagor*], his heirs or assigns, or left at his or their last usual place of abode, —— calendar months' notice, in writing, of his or their intention to proceed upon the said judgment, unless the said principal and interest monies shall be paid at or before the expiration of such notice; and if the same monies shall not be paid pursuant to the requisition in such notice,"

OF PLANTATIONS IN THE WEST INDIES.

MORTGAGE *in Fee of* PLANTATIONS *in the Island of* ST. CHRISTOPHER (*a*), *to secure a* SUM ALREADY ADVANCED, *and* FURTHER ADVANCES *to be made.* COVENANT *by* MORTGAGOR *to* CONSIGN *a certain Portion of the* PRODUCE *to* MORTGAGEES. COVENANT *by* MORTGAGEES *to make* ADVANCES *on* CONSIGNMENTS *in a given Ratio.*

THIS INDENTURE, &c., BETWEEN [*mortgagor*], of &c., of the one part; and [*mortgagees*], of &c., merchants and copartners, of the other part. WHEREAS the said [*mortgagor*] is seised or entitled for an estate of inheritance in fee-simple in possession of or to the plantations, or tracts and pieces or parcels of land hereinafter particularly mentioned, situate in the island of St. Christopher, in the West Indies, with the erections and buildings thereupon; and is also seised or possessed, or absolutely entitled, of or to the negro and other slaves, cattle, plantation implements and utensils, and other live and dead stock, upon or belonging to the said plantations, or tracts and pieces or parcels of land; but subject, and charged and chargeable, to and with the several mortgages and incumbrances hereinafter mentioned, or referred to, of or upon the whole, or some part or parts of the said plantations, hereditaments, and premises. AND WHEREAS the said [*mortgagor*] having occasion for the sum of 7000*l.*, and for such other advances as are hereinafter mentioned, hath applied to and requested the said [*mortgagees*] to advance and lend him the said sum of 7000*l.*, and to enter into the covenant hereinafter contained for mak-

Recital of seisin of mortgagor.

Agreement for loan.

Laws of Leeward Caribbee islands.

(*a*) As to the laws relating to conveyances in Antigua and the other Leeward Caribbee islands, *vide ante*, Vol. 2, pp. 213, 223. A summary of the laws relating to the other British West India islands will be found *ante*, Vol. 2, pp. 249, *et seq.*, in the Editor's second edition of the present work.

ing such further advances as are hereinafter mentioned. And in order to induce the said [*mortgagees*] so to do, the said [*mortgagor*] hath proposed to secure the repayment of the said sum of 7000*l.*, and such further advances as aforesaid, with interest for the same respectively in the meantime, in manner hereinafter mentioned. AND WHEREAS the said [*mortgagees*], having taken the said request and proposal of the said [*mortgagor*] into consideration, have agreed to comply with the same; and accordingly they the said [*mortgagees*] have this day paid or advanced to the said [*mortgagor*] the sum of 7000*l.* of lawful money of the United Kingdom of Great Britain and Ireland, as money is valued in Great Britain. AND WHEREAS, in pursuance and part performance of the proposal so made by the said [*mortgagor*] as aforesaid, he the said [*mortgagor*] hath this day, by the direction of the said [*mortgagees*], executed to [*attorney*] a warrant of attorney, to confess, in the name of him the said [*mortgagor*], judgment in any action or actions of ejectment (*b*), to be brought in the proper court of the said island of St. Christopher, at the suit of the said [*mortgagees*], for recovering the possession of the said plantations, hereditaments, and premises: And it is intended and agreed that such judgment shall be forthwith entered up of record in the proper court of the said island, and that no writ of error or appeal shall be allowed from such judgment. NOW THIS INDENTURE WITNESSETH, that, in pursuance and further performance of the said proposal on the part of the said [*mortgagor*], and in consideration of the said sum of 7000*l.* paid or advanced by the said [*mortgagees*] to the said [*mortgagor*], as hereinbefore is mentioned, the receipt of which said sum of 7000*l.* the said [*mortgagor*] doth hereby admit and acknowledge, and of and from the same and every part thereof doth acquit, release, and discharge the said [*mortgagees*], and each and every of them, their, and each and every of their heirs, executors, administrators, and assigns, for ever, by these presents; and for and in consideration of the sum of 10*s.* of lawful money of Great Bri-

OF PLANTATIONS IN THE WEST INDIES.

Recital of agreement for lease.

Of warrant of attorney in ejectment.

Testatum.

In consideration of money now advanced.

(*b*) *Vide* precedent of a warrant of attorney in ejectment, *ante*, p. 530.

OF PLANTATIONS IN THE WEST INDIES.

tain to the said [*mortgagor*] paid by the said [*mortgagees*], at or immediately before the sealing and delivery of these presents, (the receipt whereof is hereby acknowledged, He the said [*mortgagor*] *Hath* granted, bargained, sold, released, assigned, and confirmed, and by these presents *Doth* grant, &c. unto the said [*mortgagees*], their heirs, executors, administrators, and assigns, respectively, according to the nature and quality thereof respectively, ALL THAT, *(describe parcels);* and which said [*mortgagees*] are now in the actual possession of all such parts of the premises hereinbefore mentioned to be hereby released and assigned, as are or is of the nature of freehold, or of real estate, by virtue of a bargain and sale to them thereof made by the said [*mortgagor*], in consideration of 5*s.*, by an indenture bearing date the day next before the day of the date of these presents, for the term of one whole year, commencing from the day next before the day of the date of the said indenture of bargain and sale, and by force of the statute made for transferring uses into possession (*c*): AND the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits, of all and singular the said plantations, hereditaments, and premises hereinbefore mentioned to be hereby released and assigned respectively, and every of them, and every part and parcel thereof; AND all the estate, right, title, interest, use, trust, possession, property, possibility, claim, and demand whatsoever, both at law and in equity, of him the said [*mortgagor*], of, in, to, from, and out of the said plantation, hereditaments, and premises, and every of them, and every part and parcel thereof, TO HAVE AND TO HOLD all such parts of the premises hereinbefore mentioned to be hereby released and assigned, as are or is of the nature of freehold or real estate, (subject to the incumbrances upon the same premises respectively hereinafter mentioned), unto the said [*mortgagees*], their heirs and assigns, TO THE USE of the said [*mortgagees*], their heirs and assigns, for ever; ***But subject*** to the proviso or condition, covenant, and agreement, hereinafter contained, for redemption of the

Mortgagor grants and releases to mortgagee.

Reference to lease for a year.

—and the reversion, &c.

—and all the estate, &c.

Habendum as to such part as is real estate.

(*c*) *Vide post*, p. 543.

same premises. AND TO HAVE AND TO HOLD all such parts of the premises hereinbefore mentioned to be hereby released and assigned, as are or is personal estate, or of the nature of chattels, (subject to the incumbrances upon the same premises respectively hereinafter mentioned), unto the said [*mortgagees*], their executors, administrators, and assigns, henceforth for their proper use and benefit; *But subject* to the proviso or condition, covenant, and agreement hereinafter contained, for redemption of the same premises. PROVIDED ALWAYS, *and it is hereby agreed and declared between and by the said* [*mortgagees*], that if the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall and do, on the —— day of —— now next ensuing, well and truly pay, or cause to paid, to the said [*mortgagees*], their executors, administrators, or assigns, at the Royal Exchange, in the city of London, the sum of 7000*l.* of lawful money of the United Kingdom of Great Britain and Ireland, as money is valued in Great Britain, with interest for the same, at the rate of £—— (*d*) for every hundred

OF PLANTATIONS IN THE WEST INDIES.

Habendum as to such part as is personal estate.

Proviso for redemption, on repayment of money now advanced and to be advanced, pursuant to mortgagees' covenant, and interest.

(*d*) By stat. 14 Geo. 3, c. 79, all securities then already made by British subjects in Great Britain on lands, slaves, or other things, in Ireland, or any British West India colony, to other British subjects, for securing money lent, with interest, and all transfers thereof made in Great Britain to British subjects, are declared to be as good as if made in the place where such mortgaged property is, so as the interest did not exceed the rate of interest allowed in such colony, &c.: and all securities made by British subjects, *after the passing of the act*, in Great Britain, concerning lands, slaves, or other things in Ireland, or any British West India colony, to British subjects, in repayment of monies lent, and interest, and all bonds, &c., for securing the same, and all transfers thereof, to be as valid as if made in the place where the property is situate, *so as the interest secured do not exceed* 6*l. per cent.*; provided the lender do not knowingly lend more money than the security is worth at the time of the loan; and provided also, that the security be duly registered, according to the laws of the place where the lands, &c. lie.

Rate of interest in the West Indies.

By stat. 1 & 2 Geo. 4, c. 51, this act is declared to extend to the bonds and covenants of third parties, given as a collateral security for the payment of interest in Great Britain. But this statute is repealed by stat. 3 Geo. 4, c. 47, which declares all securities concerning lands, &c., in Ireland and the West Indies, and all conveyances, &c., and bonds and covenants executed in Great Britain, to any of his Majesty's subjects, either

OF PLANTATIONS IN THE WEST INDIES.

pounds by the year, computed from the day of the date of these presents: And also all and every sums and sum of money (if any) which the said [*mortgagees*], their executors, administrators, or assigns, shall have advanced or lent, or engaged for the payment of, to or for the use, or on the account of the said [*mortgagor*], his heirs, executors, administrators, or assigns, in pursuance of the covenant or agreement hereinafter for that purpose contained; together with interest for the same sums of money respectively after the rate aforesaid, to be computed from the time or respective times of advancing the same respectively, without any deduction or abatement whatsoever, [out of the said sum of 7000*l.*, or such other sums or sum of money as aforesaid, or the interest thereof respectively, for or in respect of any taxes, charges, rates, assessments, payments, or impositions, taxed, charged, assessed, or imposed, or to be taxed, charged, assessed, or imposed, on the said plantations, hereditaments, and premises hereby granted, released, and assigned, or mentioned or intended so to be, or any of them, or upon the said sum of 7000*l.*, or such other sums or sum of money as aforesaid, or any part thereof respectively, or upon the said [*mortgagees*], their heirs, executors, administrators, or assigns, or any other person or persons whomsoever, for, upon account, or in respect of the said plantations, hereditaments, and premises, or any of them; or of the said sum of 7000*l.*, or such other sums or sum of money as aforesaid, or any part thereof respectively, by authority of

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by the borrower or any other person residing in Great Britain or elsewhere, whether collaterally or otherwise, and whether to secure the payment of a higher rate of interest than the principal securities, or not, and whether given at the same or any subsequent time, shall be as good as if the person making such conveyances, &c., had resided where the lands, &c. lie.

The stat. of 14 Geo. 3, clearly does not extend to personal contracts; and, therefore, where A. contracted with B. for the sale of an estate in the West Indies, and it was agreed that part of the purchase-money should remain secured by the bond of B. and C., and that bond was afterwards cancelled, and another executed in England by B. and C., reserving 6*l. per cent.* interest, (in the same manner as the former one), the bond was held to be void for usury. *Dewar* v. *Span*, 3 D. & E. 425.

OF PLANTATIONS IN THE WEST INDIES.

Parliament, or of the interior legislature of the said island of St. Christopher, or otherwise howsoever, or for, or upon account or in respect of any other matter, cause, or thing whatsoever]; then, and in such case, they the said [*mortgagees*], their heirs, executors, administrators, or assigns respectively, shall and will, at any time after such payment shall be so made as aforesaid, upon the request and at the proper costs and charges of the said [*mortgagor*], his heirs, executors, administrators, or assigns, reconvey and assign the said plantations, hereditaments, and premises hereby granted, and released, and assigned respectively, or mentioned or intended so to be, with their appurtenances, unto the said [*mortgagor*], his heirs, executors, administrators, and assigns respectively, according to the nature and quality of the same premises respectively, or as he or they shall in that behalf order or direct, free from all incumbrances whatsoever, made, done, or committed by the said [*mortgagees*], their heirs, executors, administrators, or assigns, or any of them; [so as for the doing thereof the said [*mortgagees*], their heirs, executors, administrators, or assigns, or any of them, be not compelled or obliged to go or travel from the place or places of his, or their, or any of their usual abode or dwelling]. PROVIDED ALSO, and it is hereby further agreed and declared between and by the parties to these presents, that if at any time or times before the said —— day of —— now next ensuing, or at any time or times after the said —— day of —— now next ensuing, and before the said [*mortgagees*], their heirs, executors, administrators, or assigns, respectively, shall have reconveyed and reassigned the premises hereby granted, released, and assigned, respectively, or expressed and intended so to be, or shall have been requested so to do by the said [*mortgagor*], his heirs, executors, administrators, or assigns, by any writing under his or their hand or hands, they the said [*mortgagees*], their executors, administrators, or assigns, shall advance, or lend, or engage for the payment of any sum or sums of money, to or for the use, or on the account of the said [*mortgagor*], his heirs, executors, administrators, or assigns, (other than the advances hereinafter covenanted and agreed to be made); then and in such case, (whether de-

Proviso, charging lands with sums to be advanced by mortgagees beyond the amount specified in their covenant.

OF PLANTATIONS IN THE WEST INDIES.

fault shall or shall not have been made in payment of the principal monies and interest mentioned in the proviso for redemption hereinbefore contained), All and singular the said plantations, hereditaments, and premises hereby granted, and released, and assigned, respectively, or expressed and intended so to be, with their appurtenances, shall be and remain a security to the said [*mortgagees*], their executors, administrators, and assigns, for, and stand and be charged and chargeable with, the repayment to them of all and every sums and sum of money which shall be so advanced, or lent, or engaged for the payment of, as lastly hereinbefore is mentioned, with interest thereupon respectively after the rate aforesaid, at the expiration of six calendar months from the time or respective times of advancing the same; and shall not be redeemed or redeemable but upon payment, as well of the said sum of 7000*l.*, and such further sum or sums of money so as aforesaid to be advanced or lent, or engaged for the payment of, in pursuance of the covenant or agreement hereinafter for that purpose contained, with the interest thereof respectively, after the rate, and on or at the day or time hereinbefore mentioned or appointed for the payment thereof respectively; as also of all and every or any such other sums or sum of money which shall be so advanced or lent, or engaged for the payment of, by the said [*mortgagees*], their executors, administrators, or assigns, either before or after the said —— day of —— now next ensuing, as hereinbefore is mentioned, with interest thereupon respectively, after the rate aforesaid, after the expiration of six calendar months from the time or respective times of advancing the same. And the said [*mortgagor*] doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the said [*mortgagees*], their executors, administrators, and assigns, that he, the said [*mortgagor*], his heirs, executors, or administrators, shall and will, on the said —— day of —— now next ensuing, well and truly pay, or cause to be paid unto the said [*mortgagees*], their executors, administrators, or assigns, the aforesaid sum of 7000*l.*, and all and every such further sums or sum of money so to be advanced, or lent, or engaged to be paid by them the said [*mortgagees*], their

Covenant by mortgagor to pay money now advanced;

And further sums to be advanced pursuant to covenant.

executors, administrators, or assigns, in pursuance of the covenant or agreement hereinafter for that purpose contained, with interest for the same respectively, after the rate and in the manner aforesaid, without any deduction or abatement whatsoever, according to the true intent and meaning of these presents; And also shall and will from time to time well and truly pay, or cause to be paid, to the said [*mortgagees*], their executors, administrators, or assigns, all and every, or any other sums or sum of money so to be advanced, or lent, or engaged for the payment of by them as aforesaid, with interest thereupon respectively, after the rate aforesaid, at the expiration of six calendar months from the time or respective times of advancing the same. *(Add usual covenants for title, excepting incumbrances, also for insurance of buildings, mills, machinery, &c., and proviso for enjoyment until default).* AND THIS INDENTURE ALSO WITNESSETH, that, in pursuance and further performance of the said proposal on the part of the said [*mortgagor*], and for further securing the payment of the said sum of 7000*l.*, and such further sum or sums of money so to be advanced or lent as aforesaid, and all interest for the same respectively, the said [*mortgagor*] Doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the said [*mortgagees*], their executors, administrators, and assigns, in manner following, (that is to say), that he the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall and will, out of and from the crop or produce in this present year of the said hereditaments and premises, ship and consign eight hundred hogsheads of sugar unto the said [*mortgagees*], their executors, administrators, or assigns, at the port of London, for sale, on the account and risk of him the said [*mortgagor*], his heirs, executors, administrators, or assigns (*e*). AND *it is hereby agreed and declared be-*

OF PLANTATIONS IN THE WEST INDIES.

And all further monies to be advanced.

Further *testatum.*

Covenant by mortgagor to ship and consign sugars to mortgagees.

Application of monies to arise

(*e*) "The grounds on which a person lending money on a West India estate is allowed the benefit of a covenant for the consignments, are twofold: first, because it furnishes him a security for his debt; and secondly, because the commission which he receives is supposed to be only a fair compensation for his trouble." *Per* Lord *Eldon*, 1 Jack. & Walk. 261.

As to the validity of covenants to consign produce.

It is doubtful whether a mortgagee can stipulate for consignments be-

OF PLANTATIONS IN THE WEST INDIES.

from consignments.

tween and by the parties to these presents, that the said [*mortgagees*], their executors, administrators, or assigns, shall from time to time cause the said sugars so to be consigned to them as aforesaid, to be insured at —— *per* hogshead, and shall apply the money, from time to time to arise or be produced by the sale of the said sugars, (after paying or retaining and satisfying thereout all the costs and charges for insurance and freight, and the usual charges for commission, and the expenses attending the said sale), in manner hereinafter mentioned, (that is to say), [it is hereby agreed and declared, that the said [*mortgagees*], their executors, administrators, or assigns, shall apply] the proceeds of the one hundred and fifty hogsheads of sugar which shall first arrive, (after such deduction thereout as aforesaid), in the first place, in payment and satisfaction of the interest which from time to time shall be due for the said principal sum of 7000*l.*, or any part thereof; and, in the next place, in or towards payment and satisfaction of the said principal sum of 7000*l.*; And shall apply the proceeds of the five hundred hogsheads of sugar which shall next arrive, (after such deductions thereout as aforesaid), in the first place, in or towards payment and satisfaction of the interest which may have become due for any advance or advances which shall or may have been made by

As to one hundred and fifty hogsheads which shall first arrive.

As to next five hundred hogsheads.

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yond the period of the loan; but where a mortgage, which was executed to indemnify persons who had agreed to become sureties for the mortgagor for a large debt to the crown, contained a covenant to consign the produce to the mortgagees for five years, and this covenant appeared to form one of the considerations for their incurring the responsibility of the suretyship; Lord *Eldon* was of opinion that it was not so oppressive a stipulation, as to induce the Court to set it aside, by appointing a receiver, on motion; his Lordship observing, that, if the mortgagees agreed to become debtors to the crown as sureties for the mortgagor on such terms, he knew no law by which the Court would interfere with the contract; and it was not alleged that an oppressive use was attempted to be made of the power, by withholding the proceeds *ultra* their own demands, which the Court would not permit. *Bunbury* v. *Winter*, 1 Jac. & Walk. 255. (As to the appointment of consignees by the Court of Chancery, see *Bowersbank* v. *Collasseau*, 3 Ves. 164; *Forbes* v. *Hammond*, 1 Jac. & Walk. 83; *Attorney-General* v. *Day*, 2 Madd. 252). A mortgagee not taking possession will not be appointed consignee by the Court, unless the deed contains a covenant for that purpose. *Cox* v. *Champneys*, Jacob, 576.

OF PLANTATIONS IN THE WEST INDIES.

the said [*mortgagees*], their executors, administrators, or assigns, in pursuance of the covenant or agreement hereinafter for that purpose contained; and, in the next place, in or towards the re-payment and discharge of such last-mentioned advance or advances; And shall apply all the residue or surplus of such last-mentioned proceeds, (if any), and also the proceeds arising from the one hundred and fifty hogsheads of sugar which shall arrive last, (after such deductions thereout as aforesaid), in the first place, in or towards payment and satisfaction of the interest which shall be due on the security of this present indenture, and, in the next place, in or towards payment and satisfaction of so much and such part of the said sum of 7000*l.*, as shall not have been paid off and discharged by the ways and means aforesaid; And of all and every other principal sums and sum of money (if any) which shall then be due or owing to them the said [*mortgagees*], their executors, administrators, or assigns, on the security intended to be made by these presents; And, after full payment and satisfaction thereof, shall pay all the surplus or residue of the said proceeds (if any) unto the said [*mortgagor*], his heirs, executors, administrators, or assigns, for his or their proper use and benefit. AND THIS INDENTURE LASTLY WITNESSETH, that, in pursuance and further performance of the said agreement on the part of the said [*mortgagees*], they the said [*mortgagees*] do for themselves, their executors, administrators, and assigns, covenant and agree with the said [*mortgagor*], his executors, administrators, and assigns, by these presents, That, after bills of lading of the first one hundred and fifty hogsheads of sugar to be shipped and consigned, in pursuance of the covenant or agreement hereinbefore for that purpose contained, shall have been received by them the said [*mortgagees*], their executors, administrators, or assigns, they the said [*mortgagees*], their executors, administrators, or assigns, shall and will from time to time make advances to the said [*mortgagor*], his executors, administrators, or assigns (*f*),

As to last one hundred and fifty hogsheads.

Further *testatum*.

Covenant by mortgagees to make advances on consignments in a certain *ratio*.

(*f*) Where a security is to extend to future advances of a given amount, some persons introduce a clause expressly negativing any *obligation* on the mortgagee to make advances to that extent.

OF PLANTATIONS IN THE WEST INDIES.

of 20*l.* *per* hogshead on the five hundred hogsheads of sugar, which next after the said first one hundred and fifty hogsheads shall be shipped and consigned to them the said [*mortgagees*], their executors, administrators, or assigns, such advances (amounting together to the sum of 10,000*l.*) to be made in bills at three months' date, when and as from time to time the bills of lading of the same five hundred hogsheads of sugar shall be received by the said [*mortgagees*], their executors, administrators, or assigns, and the insurances effected thereupon as aforesaid.

Appointment of attornies to acknowledge deed before registrar.

AND LASTLY, the said [*mortgagor*] and [*mortgagees*] do, and each and every of them doth hereby nominate, constitute, and appoint [*attornies*], of the said island of St. Christopher, —— jointly and severally, their and his true and lawful attornies and attorney, to acknowledge the respective hands and seals of them the said [*mortgagor*] and [*mortgagees*], subscribed and affixed to these presents, and to the lease for a year on which the same are grounded, to be their respective hands-writing and seals, and to acknowledge these presents, and the said lease for a year (*g*), as their respective acts and deeds, before the registrar of the said island, or his lawful deputy for the time being, or other competent person in the said island, in order that the same may be registered and recorded, according to the acts, laws, and constitution of the said island of St. Christopher, as fully and effectually, to all intents and purposes, as they the said [*mortgagor*] and [*mortgagees*] respectively might or could do if personally present. IN WITNESS, &c.

As to leases for a year in colonial conveyances.

(*g*) It is stated in a former part of the present work, (*ante*, Vol. 2, p. 222), that a lease for a year is useless in the conveyance of "freehold colonial property." Such undoubtedly is the fact in regard to Jamaica, Barbadoes, Antigua, St. Vincent, Upper Canada, and New Brunswick, in which, by the provisions of various acts of the local legislatures of those colonies, deeds duly registered, whether executed there or elsewhere, have the operation of conveyances without livery of seisin, or any other ceremony. And so in Dominica, if the deed be made *in* the island: but the Editor has not been able to discover any authority for treating this rule as applicable to St. Kitts, Trinidad, the Bahama islands, or any other British colonial possession. A lease for a year, therefore, in the present instance, seems to be proper.

IN TRUST FOR SALE OF WEST INDIA ESTATE.

RELEASE *in* FEE *of* PLANTATIONS, *&c. in the* BAHAMAS *to* TRUSTEES, *(in which a prior Mortgagee joins)*, UPON TRUST FOR SALE (*a*), *to* SECURE *the* PAYMENT *of certain* BILLS *of* EXCHANGE, *which the Mortgagees had accepted for the Accommodation of the Mortgagors to pay off a subsisting Judgment and Mortgage, and also other Monies* TO BE ADVANCED *by Mortgagees for* SUPPLIES, *&c.;* COVENANT *by* MORTGAGORS *to* SHIP *and* CONSIGN PRODUCE *to Mortgagees;* —— *by* MORTGAGEES NOT *to* CALL IN *Mortgage-money* WITHOUT NOTICE, WHILE CONSIGNMENTS *are regularly made.* INDEMNITY *to* TRUSTEES. ASSIGNMENT *of* JUDGMENT *by Creditor, in trust for the Benefit of Mortgagees, and to* ATTEND *the* INHERITANCE.

Parties.

THIS INDENTURE, &c., BETWEEN [*judgment and mortgage creditor*], of the Grand Cairos in America, of the first part; [*two mortgagors*], both late of the Grand Cairos aforesaid, and now of ——, Esquires, of the second part; [*two mortgagees*], both of the City of London, merchants and copartners, of the third part; [*two trustees for sale*], of &c., of the fourth part; and [*assignee in trust of judgment*], of &c., of the fifth part. WHEREAS, by a bond or obligation in writing, bearing date the —— day

Recital of bond by mortgagors and their late father.

(*a*) According to the laws of Jamaica, mortgagees may, by suit in Equity, obtain a decree for the sale of the estate; but, in a late case, Sir *J. Leach*, V. C., restrained a mortgagee (all the parties being in England), from proceeding in such a suit after a bill for redemption here, under which there had been a decree referring it to the Master to ascertain the amount of the incumbrances; his Honor imposing upon the plaintiff the terms of undertaking to consent to such orders in the Jamaica cause, as the Court of Chancery in England should think reasonable. *Beckford* v. *Kemble*, 1 Sim. & Stu. 7.

Foreclosure in Jamaica restrained.

IN TRUST FOR SALE OF WEST INDIA ESTATE.

of ——, the said [*mortgagors*] and [K. L.], late of the Grand Cairos aforesaid, Esquire, (the father of the said [*mortgagors*]), became jointly and severally bound to the said [*judgment and mortgage creditor*] in the sum of 32,230*l.* of current money of the Bahama islands, with a condition written under the said bond or obligation for making the same void on payment by the said [*mortgagors*], and [K. L.], and [A.W.], and [F.R.], (which said [A.W.] and [F. R.] were named in the said bond as obligors, but never executed the same), their heirs, executors, or administrators, or either or any of them, unto the said [*judgment and mortgage creditor*], his executors, administrators, or assigns, of the sum of 16,615*l.* of like current money of the said Bahama islands, on or before the —— day of ——, with lawful interest thereon, from the date of the said bond or obligation, at the rate of £—— *per centum per annum*, payable at the expiration of the said term. AND WHEREAS by a deed or instrument in writing, under the hand and seal of the said [*one of the mortgagors*], bearing date the —— day of ——, in consideration of the debt then due to the said [*judgment and mortgage creditor*] on the said bond or obligation, and for the better securing the payment thereof with interest, the said [*one of the mortgagors*] did bargain and sell unto the said [*judgment and mortgage creditor*], all those fifty negroes and other slaves, then in the possession of the said [*one of the mortgagors*], of the Grand Cairos aforesaid, (to wit), men and boys, *(here follow their names);* women and girls, *(here follow their names);* children, *(here follow their names):* To hold the said slaves, with the future issue and increase of the females thereof, unto and to the use of the said [*judgment and mortgage creditor*], his executors, administrators, and assigns, subject to a proviso or condition in the said deed or instrument now in recital contained, for redemption of the same premises, on payment by the said [*one of the mortgagors*], his executors or administrators, unto the said [*judgment and mortgage creditor*], his executors or administrators, of the said sum of 16,615*l.* of current money of the said islands, with interest thereon from the day of the date of the said bond, on or before the —— day of ——, which would be in the year of our Lord

Mortgage by one of the mortgagors.

——, in three equal and annual payments from the date of the said deed or instrument now in recital. And whereas, in the year ——, the said [*mortgagor's father*] departed this life intestate, and, soon after his decease, administration of his rights, chattels, and credits was duly granted to the said [*one of the mortgagors*]. And whereas, on or about the —— day of ——, the said [*judgment and mortgage creditor*] obtained judgment on the said bond in the general court of the Bahama islands aforesaid, to recover against the said [*administrator*], as the administrator of the said [*K. L. deceased obligor*], the sum of 6,640*l.* 18*s.* of lawful money of the said islands, of the goods and chattels which were of the said [*deceased obligor*] in his life-time, and which had then come to the hands of the said [*administrator*], as his administrator as aforesaid, and to recover against the said [*administrator*], administrator as aforesaid, the residue of the penalty of the said bond or obligation; And also 23*l.* 3*s.* 10*d.* of like lawful money of the said islands, for his damages, costs, and charges by him about his suit in that behalf expended, to be levied of the lands, tenements, hereditaments, and real estates, which were of the said [*deceased obligor*] at the time of his death, in the said Bahama islands, and remained assets unadministered; And also the goods and chattels which were of the said [*deceased obligor*] at the time of his death, when such goods and chattels should thereafter come to the hands of the said [*administrator*] to be administered. And whereas the said [*mortgagors*] are, or one of them is, seised or entitled for an estate in fee simple in possession of or to certain plantations, tracts, or parcels of land situate in the Grand Cairos aforesaid, containing by estimation —— thousand acres, be the same more or less, together with the erections and buildings thereon erected and built; And they also are, or one of them is possessed of or entitled to certain negro or other slaves, amounting to —— or thereabouts, (including therein the said negro or other slaves mortgaged by the said [*one of the mortgagors*] to the said [*judgment and mortgage creditor*],) as hereinbefore is mentioned, or such of them as are now living, and the issue and increase of the females of the said last-mentioned negro and other slaves), and of or to

In trust for sale of West India estate.

Administration to mortgagor's deceased father.

Judgment obtained against administrator.

Seisin and title of mortgagors.

IN TRUST FOR SALE OF WEST INDIA ESTATE.

certain cattle or stock, (all which said negroes, cattle, and stock, are used or employed in the cultivation of the said plantations, tracts, or parcels of land); But subject, and charged and chargeable as to the whole or some part or parts of the said plantations, hereditaments, negroes, and premises, under or by virtue of the said deed or instrument in writing, of the —— day of ——, and the said judgment obtained against the said [*administrator*], as hereinbefore is mentioned, or some other lien or liens created or subsisting thereupon, to and with the payment of the said sum of 16,615*l.* current money of the Bahama islands aforesaid, and the interest due for the same. AND WHEREAS on the —— day of —— now last past, there was justly due and owing to the said [*judgment and mortgage creditor*] for principal and interest on his said securities, the sum of 26,473*l.* 4*s.* 7*d.* like currency of the said Bahama islands, as they the said [*mortgagors*] do hereby respectively admit and acknowledge. AND WHEREAS the said sum of 26,473*l.* 4*s.* 7*d.* being reduced into sterling money of Great Britain, doth amount to the sum of 15,442*l.* 12*s.* 4*d.* AND WHEREAS, some time in or about the month of —— now last past, it was proposed and agreed, by and between the said [*mortgagors*], and the said [*judgment and mortgage creditor*], that the said [*judgment and mortgage creditor*] should accept payment of the said sum of 15,442*l.* 12*s.* 4*d.* sterling, so due and owing to him on the said —— day of —— now last past, as aforesaid, together with interest thereon, after the rate of 5*l.* for every 100*l.* by the year, by four annual instalments, on the first day of ——, the first day of ——, the first day of ——, and the first day of ——, the same payments to be respectively secured by bills of exchange, to be drawn by the said [*mortgagors*] on, and accepted by some responsible mercantile house in the city of London, and made payable to the order of the said [*judgment and mortgage creditor*] or [*agent*], as his agent in that behalf. AND WHEREAS the said [*mortgagors*] applied to and requested the said [*mortgagees*] to accept the said bills of exchange, so agreed to be drawn by them the said [*mortgagors*] to the order of the said [*judgment and mortgage creditor*] or the said [*agent*], as his agent, as hereinbefore is mentioned; And the said [*mortgagees*] con-

Amount of debt owing to judgment and mortgage creditor in local currency.

In British currency.

Agreement by judgment and mortgage creditor to accept latter sum in satisfaction.

To be secured by certain bills of exchange.

Agreement by mortgagees to accept such bills on account of mortgagors,

IN TRUST FOR SALE OF WEST INDIA ESTATE.

sented and agreed so to do, on having (*b*) the repayment of all sums of money to be paid or advanced by them, in or towards payment or satisfaction of the said bills of exchange, and all other sums of money to be paid or advanced by them the said [*mortgagees*], and their executors, administrators, or assigns, to or for the use, or on the account of the said [*mortgagors*], or either of them, their or either of their heirs, executors, administrators, or assigns, for or in respect of the said plantations, or the supplies thereof, or in anywise relating to the stocking, cultivating, and improving the same, or purporting or appearing so to be paid or advanced, together with interest for the same respectively, in the meantime, in manner hereinafter mentioned.

On having the same, and all future sums to be advanced for supplies, &c., secured, as hereinafter mentioned.

Delivery of bills according to agreement.

AND WHEREAS, in pursuance and part performance of the said agreement, the said [*mortgagors*] have this day drawn four several bills of exchange on the said [*mortgagees*], each bearing date respectively the —— day of —— now last past, payable to the said [*agent*], or order, as the agent of the said [*judgment and mortgage creditor*], in that behalf; and which said several bills of exchange have been duly accepted by the said [*mortgagees*], and delivered to the said [*agent*], as the agent of the said [*judgment and mortgage creditor*], the particulars of which said several bills are contained in the schedule marked A. hereunder written.

Bond by mortgagors to mortgagees.

AND WHEREAS, in pursuance and further performance of the said agreement on the part of the said [*mortgagors*], they the said [*mortgagors*] have this day executed and given to the said [*mortgagees*] a bond or obligation in writing, bearing even date with these presents, and are thereby become jointly and severally bound to the said [*mortgagees*] in the sum of 30,000*l.* of lawful money of Great Britain, with a condition thereunder written for making the same void, if the said [*mortgagors*], or either of them, their or either of their heirs, executors, or administrators, shall and do, from time to

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(*b*) Or, for the sake of brevity—

"on having such security executed to them as is hereinafter contained,"

IN TRUST FOR SALE OF WEST INDIA ESTATE.

time, pay or cause to be paid unto the said [*mortgagees*], their executors, administrators, or assigns, within the space of six calendar months from the time or respective times of advancing the same, all and every sums and sum of money which shall or may be advanced by the said [*mortgagees*], their executors, administrators, or assigns, in or towards payment or discharge of the said bills of exchange, or any of them, or which, at any time or times during so long as the said four several bills of exchange, or any of them, shall continue unpaid, or any sum or sums of money shall be due or owing to the said [*mortgagees*], their executors, administrators, or assigns, on the security intended to be made by the said bond or obligation, and by these presents, shall be otherwise advanced by the said [*mortgagees*], their executors, administrators, or assigns, to or for the use, or on the account of the said [*mortgagors*], or either of them, their or either of their heirs, executors, administrators, or assigns, on the account and for the purposes aforesaid, together with interest for the same sums of money respectively, after the rate of 5*l. per centum per annum.* NOW THIS INDENTURE WITNESSETH, that, in pursuance and further performance of the said agreement, and in consideration of the premises, and for and in consideration of the sum of 10*s.* a-piece of lawful money aforesaid, paid to the said [*judgment and mortgage creditor*] and [*mortgagors*] by the said [*trustees for sale*], at or immediately before the sealing and delivery of these presents, (the receipt whereof is hereby acknowledged), *He* the said [*judgment and mortgage creditor*], at the request and by the direction of the said [*mortgagors*] and [*mortgagees*], testified by their severally executing these presents, and so far as relates to such and so many and such part and parts of the hereditaments hereby released and assigned respectively, as he the said [*judgment and mortgage creditor*] is in anywise seised or possessed of, or entitled to, or interested in, either at law or in equity, under or by virtue of any mortgage, charge, judgment, or other lien or liens, by which the same premises, or any of them, or any part or parts thereof, are or is charged with, or made subject to the said debt owing to

Testatum.

In consideration of the premises,

judgment and mortgage creditor

IN TRUST FOR SALE OF WEST INDIA ESTATE.

the said [*judgment and mortgage creditor*], as hereinbefore is mentioned, or any part thereof, *Hath* bargained, sold, released, and assigned, and by these presents *Doth*, &c. And the said [*mortgagors*] *Have*, and each of them *Hath* granted, bargained, sold, released, assigned, ratified, and confirmed, and by these presents *Do*, &c., unto the said [*trustees for sale*], their heirs, executors, administrators, and assigns respectively, according to the nature and quality of the same premises respectively, ALL THOSE the said several plantations, tracts, or parcels of land, situate in the Cairos aforesaid, containing —— acres, (be the same more or less), of or to which the said [*mortgagors*], or one of them, are or is seised or entitled, as hereinbefore is mentioned, with the erections and buildings thereon erected and built: *And* all and singular the said negro and other slaves (amounting to one hundred and twenty, or thereabouts) particularly enumerated and described in the schedule to these presents marked B. hereunder written (*c*); And also all the cattle, plantation utensils, and live and dead stock whatsoever, now in or upon, or used or employed in the cultivation of the said plantations, or tracts or parcels of land, or any of them, or any part thereof; *Together* with the offspring, issue, and increase of the females of the said negro and other slaves and live stock: *And also* all and singular other the plantations, lands, tenements, hereditaments, cattle, plantation implements and utensils, stock and effects, situate and being in the Cairos aforesaid, which the said [*mortgagors*], or either of them, are or is in anywise seised or possessed of, or entitled to, or interested in; And also all and singular the cattle and stock, which, at any time hereafter, during so long as any money shall be due and owing on the security intended to be made by these presents, shall be in or upon, or used or employed in the cultivation of the said plantations, lands, tenements, and hereditaments, or any of them, or any part thereof, with the rights, members, and appurtenances to

—releases and assigns;

And mortgagors grant, assign, and confirm

—plantations before described;

And the slaves described in schedule;

And offspring of slaves;

And all other plantations of mortgagors in the Cairos.

(*c*) *Vide* slave registry act, 59 Geo. 3, c. 120, noticed *ante*, p. 155, and fully stated, Vol. 2, p. 247. The provisions of this statute have been incorporated in the late act of 5 Geo. 4, c. 113, s. 37.

IN TRUST FOR SALE OF WEST INDIA ESTATE.

the said premises belonging, or in anywise appertaining; [The said [*trustees for sale*] now being in the actual possession, &c., *ut ante*, p. 535 (*d*)]; *And* the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of all and singular the premises [hereinbefore mentioned to be hereby released and assigned respectively, and every of them, and every part and parcel thereof]: *And* all the estate, right, title, interest, use, trust, possession, property, possibility, claim, and demand whatsoever, both at law and in equity, of them the said [*judgment and mortgage creditor*] and [*mortgagors*], and each and every of them, of, in, to, from, and out of the said hereditaments and premises, and every of them, and every part and parcel thereof: To HAVE AND TO HOLD all such parts of the premises hereinbefore released, or otherwise assured, as are or is of the nature of freehold or real estate, unto and to the use of the said [*trustees for sale*], their heirs and assigns, for ever, freed and discharged from all provisoes, and conditions, and agreements for redemption, now affecting the same premises, or any parts or part thereof: AND TO HAVE AND TO HOLD all such parts of the premises hereinbefore assigned, or otherwise assured, as is personal estate, or of the nature of chattels, unto the said [*trustees for sale*], their executors, administrators, and assigns, from henceforth freed and absolutely discharged, as hereinbefore is mentioned; *Nevertheless*, as to all and singular the premises hereinbefore mentioned to be hereby released and assigned respectively, upon the trusts, and for the intents and purposes hereinafter expressed, that is to say, UPON TRUST, that, if default shall happen to be made in payment of the several bills of exchange so drawn by the said [*mortgagors*], and accepted by the said [*mortgagees*], as hereinbefore is mentioned, or any of them, on or at the days or times when the same respectively shall become due and payable, Then and in such case, and so often as the same shall happen, they the said [*trustees for sale*], and the survivor of them, and the heirs, executors, or administrators of such survivor, or

And the reversion, &c.

And all the estate, &c.

Habendum as to the freeholds.

Habendum as to the chattel interests;

—upon trust for sale, in case of default of payment of bills of exchange.

(*d*) As to a lease for a year, *vide ante*, p. 543.

their or his assigns (*e*), do and shall, by selling, mortgaging, or otherwise disposing of the said plantations, hereditaments, and premises hereby released and assigned respectively, or expressed and intended so to be, or any of them, or any part or parts thereof, either together or in parcels, for such price or prices, or sum or sums of money, as they or he shall think proper, (and such sale or sales to be made either by public auction or private contract, at their or his discretion), levy and raise such sum or sums as shall be sufficient, or as they or he shall think proper, for paying and satisfying the money secured, or intended to be secured, by the bill or bills of exchange, in payment of which default shall so happen to be made as aforesaid; and all interest which shall have become due thereon, and all costs, charges, damages, and expenses, occasioned by the non-payment thereof: And do and shall, for the purposes aforesaid, or any of them, enter into, make, do, and execute, or cause or procure to be entered into, made, done, and executed, all such contracts, covenants, agreements, sales, dispositions, conveyances, assignments, and assurances, acts, deeds, matters, and things, which, to them the said [*trustees for sale*], or the survivor of them, or the heirs, executors, or administrators of such survivor, or their or his assigns, shall seem reasonable or proper. (*Declaration that sales shall be binding on mortgagors*, ut ante, p. 444). And *it is hereby agreed and declared between and by the parties to these presents*, that it shall and may be lawful to and for the said [*trustees for sale*], or the survivor of them, or the heirs, executors, or administrators of such survivor, or their or his assigns, to sign and give a receipt or receipts for any sum or sums of money payable to them or him, under or by virtue of this present indenture; and that the same shall effectually discharge the person or persons to whom the same shall be given, from being accountable or answerable for the misapplication or non-application, or being in anywise obliged or concerned to

IN TRUST FOR SALE OF WEST INDIA ESTATE.

Trustees' receipts to be good discharges.

(*e*) The ordinary phraseology used in limiting powers, &c., to several persons, namely, to them and the survivor, and the heirs, executors, administrators, or *assigns*, of the survivor, is incorrect, as it would seem to import that the trust was to be exercised by the assigns of the *survivor* only.

IN TRUST FOR SALE OF WEST INDIA ESTATE.

see to the application of the money in such receipt or receipts acknowledged to be received; and that no person or persons to whom the said plantations, hereditaments, and premises, or any of them, or any part thereof, shall be sold, mortgaged, or otherwise disposed of, shall be in anywise bound or concerned to see or inquire into the necessity or expediency of any such sale, mortgage, or other disposition. AND *it is hereby agreed between and by the parties to these presents*, that the said [*trustees for sale*], and the survivor of them, and the heirs, executors, or administrators of such survivor, or their or his assigns, shall stand and be possessed of the sums of money which shall come to their or his hands or hand, by the ways and means hereinbefore mentioned, or any of them, upon and for the trusts, intents, and purposes following; (that is to say), UPON TRUST, that they the said [*trustees for sale*], and the survivor of them, and the heirs, executors, or administrators of such survivor, or their or his assigns, do and shall by and out of the same—In the first place, pay or retain all the costs and expenses which they or he shall or may have incurred in or about the execution of the trusts hereinbefore declared, and in and about the preparing, engrossing, and recording these presents, [and the lease for a year precedent thereto (*f*)], and all other deeds in anywise relating thereto: And, in the next place, pay and satisfy unto the said [*agent*], as the agent of the said [*judgment and mortgage creditor*], or any other person whom he shall or may hereafter appoint his agent, the money secured, or intended to be secured by the said bills of exchange, or any of them, in payment of which default shall have been so made as aforesaid, and all interest which shall have become due thereon, and all costs, charges, and expenses, which have been occasioned thereby; And, if any surplus of the money to be raised shall remain in the hands of the said [*trustees for sale*], their heirs, executors, administrators, or assigns, or any of them, after answering and satisfying the trusts aforesaid, do and shall stand possessed of the same, Upon the same trusts, and for the same intents and purposes, as are hereinafter

Declaration of trusts of purchase-monies—

In the first place, to pay costs;

Next to pay bills of exchange.

Trust of surplus.

(*f*) *Vide ante*, p. 543.

declared concerning the said plantations, hereditaments, and premises hereinbefore mentioned to be hereby released and assigned respectively, or such of them as shall be then subsisting, undetermined, and capable of taking effect. AND *it is hereby agreed and declared between and by the parties to these presents*, that, subject and without prejudice to the trusts hereinbefore declared, the said [*trustees for sale*], their heirs, executors, administrators, and assigns, respectively, shall stand and be seised or possessed of and interested in all and singular the premises hereinbefore mentioned to be hereby released and assigned respectively, *In trust* for the said [*mortgagees*], their heirs, executors, administrators, and assigns respectively; subject, nevertheless, to the proviso and covenant hereinafter contained for the redemption of the same premises. *(Covenant from judgment and mortgage creditor, that he hath not incumbered).* PROVIDED ALWAYS, *and it is hereby agreed and declared between and by the said* [*mortgagees*] *and the said* [*mortgagors*], that if the said [*mortgagors*], or either of them, their, or either of their several heirs, executors, administrators, or assigns, shall and do, from time to time, well and truly pay or cause to be paid to the said [*mortgagees*], their executors, administrators, or assigns, at the Royal Exchange, in the city of London, within the space of six calendar months from the time or respective times of advancing the same, all and every sums and sum of money which, during the continuance of this security, shall or may be advanced by them the said [*mortgagees*], their executors, administrators, or assigns, in or towards payment, satisfaction, or discharge of the said bills of exchange so drawn by the said [*mortgagors*], and accepted by the said [*mortgagees*], as hereinbefore is mentioned, or any of them; or which, at any time or times while the said several bills of exchange, or any of them, shall continue unpaid, or any sum or sums of money shall continue due or owing to the said [*mortgagees*], their executors, administrators, or assigns, on the security intended to be made by these presents, shall be otherwise advanced by them the said [*mortgagees*], their executors, administrators, or assigns, to or for the use, or on the account of the said [*mortgagors*], or either of them, their or either of their heirs, executors, administrators, or assigns,

IN TRUST FOR SALE OF WEST INDIA ESTATE.

Subject to aforesaid trusts,

In trust for mortgagees, subject to proviso after expressed.

Proviso, that on payment of monies intended to be secured, trustees shall stand seised, &c., in trust for mortgagors.

IN TRUST FOR SALE OF WEST INDIA ESTATE.

for or in respect of the said estate or plantations, or the supplies thereof, or in anywise relating to the stocking, cultivating, and improving thereof, or purporting or appearing so to be, together with interest for the same sums of money respectively, after the rate of 5*l.* for every 100*l.*, by the year, from the time or respective times of advancing the same, without any deduction or abatement whatsoever out of the same several sums of money, or any of them, or the interest thereof, or any part thereof respectively, [for or in respect of any taxes, rates, or assessments, payments, or impositions, which shall or may be taxed, charged, assessed, or imposed on the said plantations, hereditaments, and premises hereby released and assigned, or intended so to be, or upon the said monies intended to be hereby secured respectively, or upon the said [*trustees for sale*], their heirs, executors, administrators, or assigns, or any other person or persons whomsoever, in respect thereof respectively, by authority of Parliament, or of the local legislature of the Bahama islands aforesaid, or otherwise howsoever, or for or in respect of any other matter, cause, or thing whatsoever]; Then and in such case, and from thenceforth, they the said [*trustees for sale*], their heirs, executors, administrators, and assigns, from and after all such payments shall so be made as aforesaid, shall, subject and without prejudice to the trusts hereinbefore declared for securing the payment of the said several bills of exchange as aforesaid, stand and be seised and possessed of and interested in all and singular the said plantations, hereditaments, and premises hereby released and assigned respectively, or intended so to be, *In trust* for the said [*mortgagors*], their heirs, executors, administrators, and assigns respectively, according to their respective estates, rights, and interests in the same premises. AND the said [*mortgagors*] Do, for themselves, their heirs, executors, and administrators, and each of them doth for himself, his heirs, executors, and administrators, covenant and agree with the said [*mortgagees*], their executors, administrators, and assigns, by these presents, that they the said [*mortgagors*], their heirs, executors, administrators, or assigns, shall and will from time to time pay, or cause to be paid, unto the said [*mortgagees*], their executors, administrators, or assigns, all and every sums and sum of mo-

Joint and several covenant by mortgagors, to pay monies to be advanced, with interest.

ney to be paid or advanced by the said [*mortgagees*], their executors, administrators, or assigns, or any of them, in or towards payment and satisfaction of the said several bills of exchange, or any of them, or otherwise to or for the use or on the account of the said [*mortgagors*], or either of them, their or either of their heirs, executors, administrators, or assigns, for or in respect of the said plantations, or the supplies thereof, or in anywise relating to the stocking, cultivating, or improving thereof, or purporting or appearing so to be, as hereinbefore is mentioned, with the interest thereon respectively, within the respective times, and in the manner in the aforesaid proviso or agreement for that purpose mentioned, without any deduction or abatement whatsoever, according to the true intent and meaning of these presents. AND the said [*mortgagors*] do hereby, for themselves, their heirs, executors, and administrators, and each of them doth for himself, his heirs, executors, and administrators, covenant and agree with the said [*trustees for sale*], their heirs, executors, administrators, and assigns, by these presents, in manner following; (that is to say), That they the said [*judgment and mortgage creditor*] and [*mortgagors*], some or one of them, now have or hath in themselves or himself, good right, full power, and lawful and absolute authority, to convey and assign all the said plantations, hereditaments, and premises hereby released and assigned respectively, or intended so to be, unto and to the use of the said [*trustees for sale*], their heirs, executors, administrators, and assigns respectively, according to the several natures and qualities thereof, in manner aforesaid, according to the true intent and meaning of these presents: *And also*, that if default shall be made in payment of any sum of money intended to be secured by these presents, or the interest thereof, or any part thereof respectively, then and in such case it shall be lawful for the said [*trustees for sale*], their heirs, executors, administrators, and assigns respectively, at any time or times thereafter, into and upon all and every the said plantations, hereditaments, and premises hereby released and assigned respectively, or intended so to be, or any of them, or any part or parts thereof, to enter, and the same from thenceforth peaceably and quietly to have, hold, occupy, and enjoy, and receive and take the rents

IN TRUST FOR SALE OF WEST INDIA ESTATE.

Covenants by mortgagors with trustees for sale.

That they and judgment creditor have a right to convey.

For quiet enjoyment after default.

IN TRUST FOR SALE OF WEST INDIA ESTATE.

and profits thereof, to and for their own use, without any interruption or disturbance whatsoever, of, from, or by the said [*mortgagors*], or either of them, their or either of their heirs, executors, administrators, or assigns, or any other person or persons whomsoever, having or lawfully or equitably claiming, or to have or lawfully or equitably claim, any estate, right, title, and interest, in or to the said plantations, hereditaments, and premises, or any of them, or any part or parts thereof; *And that* free and clear [and freely and clearly, and absolutely acquitted, exonerated, and discharged, or otherwise by the said [*mortgagors*], their heirs, executors, or administrators, saved, protected, and kept harmless and indemnified] of, from, and against all and all manner of [former and other gifts, grants, bargains, sales, jointures, dowers, mortgages, uses, wills, entails, annuities, rents, statutes merchant and of the staple, recognizances, judgments, executions, extents, sequestrations, and all other estates, titles, troubles, charges, and] incumbrances whatever: *And moreover*, that they the said [*mortgagors*] respectively, and their respective heirs, executors, administrators, and assigns, and every other person whatsoever, having, or lawfully or equitably claiming, any estate, right, title, or interest, of, in, or to the said plantations, hereditaments, and premises hereby released and assigned respectively, or intended so to be, or any of them, or any part thereof, shall and will, from time to time, and at all times hereafter, upon the request of the said [*trustees for sale*], their heirs, executors, or administrators respectively, and at the costs and charges of the said [*mortgagors*], their heirs, executors, or administrators, until the said premises shall be sold, conveyed, and assured, under and by virtue of the trust for sale hereinbefore contained; and after such sale, conveyance, and assurance, at the costs and charges of the purchaser or purchasers thereof, his, her, or their heirs, executors, administrators, or assigns, make, do, and execute, or cause and procure to be made, done, and executed, all such further and other lawful acts, deeds, conveyances, assignments, and assurances in the law whatsoever, for the more effectually granting, assigning, and assuring all the said plantations, hereditaments, and premises

Free from incumbrances.

And for further assurance.

hereby released and assigned respectively, or intended so to be, with their appurtenances, unto the said [*trustees for sale*], their heirs, executors, administrators, and assigns, as by the said [*trustees for sale*], their heirs, executors, administrators, or assigns, or their, or any of their counsel learned in the law, shall be reasonably devised, or advised and required. AND in consideration of the premises, and for further securing to the said [*mortgagees*], their executors, administrators, and assigns, the sums of money to be paid or advanced by them as aforesaid, They the said [*mortgagors*] do, for themselves, their heirs, executors, and administrators, and each of them doth for himself, his heirs, executors, and administrators, covenant and agree with the said [*mortgagees*], their executors, administrators and assigns, by these presents, that, during the term of seven years, to be computed from the said —— day of —— now last past, or so long as any money shall continue due or owing to the said [*mortgagees*], their executors, administrators, or assigns, on the securities intended to be made by this present indenture, They the said [*mortgagors*], and their respective heirs, executors, administrators, or assigns, shall and will cause all the sugars and other produce, of what nature or kind soever, (rum only excepted), of the said plantations, hereditaments, and premises hereby released and assigned respectively, or any of them, or any part or parts thereof, to be shipped and consigned to the said [*mortgagees*], their executors, administrators, or assigns, or to such other person or persons in London, Bristol, Liverpool, or Greenock, as they shall direct, in order to be sold and disposed of. AND *it is hereby agreed and declared between and by the parties to these presents*, that the said [*mortgagees*], their executors, administrators, or assigns, shall, from time to time, retain or pay and apply the money to arise or be produced by the sale of the produce so to be consigned as aforesaid, (after paying or retaining thereout all the costs and expenses attending such sale, and all the usual charges for commission), in or towards payment and discharge of all and every sums and sum of money which they the said [*mortgagees*], their executors, administrators, or assigns, shall pay or advance in or towards payment or satisfaction of the said bills of

IN TRUST FOR SALE OF WEST INDIA ESTATE.

Covenant by mortgagors for seven years, or during the continuance of security,

—to ship and consign to mortgagees produce of the estate, except rum.

Trust of monies to arise from consignments.

IN TRUST FOR SALE OF WEST INDIA ESTATE.

exchange, or any of them, or otherwise, to or for the use, or on the account of the said [*mortgagors*], or either of them, their or either of their heirs, executors, administrators, or assigns, for or in respect of the said plantations, or the supplies thereof, or the stocking, cultivating, and improving thereof, or purporting or appearing so to be, and all interest to become due for the same sums of money respectively: And shall, from time to time, pay all the residue and surplus, if any, of the money so to be produced by the sale of the produce to be consigned as aforesaid unto the said [*mortgagors*], or their respective heirs, executors, administrators, or assigns, according to their respective rights and interests therein. AND the said [*mortgagees*] do hereby, for themselves, their executors, administrators, and assigns, covenant and agree with the said [*mortgagors*], and each of them, their, and each of their several heirs, executors, administrators, and assigns, that, during such time as the said [*mortgagors*], or their respective heirs, executors, administrators, and assigns, shall cause the produce of the said plantations, hereditaments, and premises to be consigned to the said [*mortgagees*], their executors, administrators, or assigns, or to their order, in pursuance of the covenants or agreements hereinbefore for that purpose contained, they the said [*mortgagees*], their executors, administrators, or assigns, shall not nor will, without having given six calendar months' notice in writing to the said [*mortgagors*], or one of them, their, or one of their respective heirs, executors, administrators, or assigns, of their intention so to do, call in or compel payment of any sum or sums of money which for the time being shall be due or owing to them the said [*mortgagees*], their executors, administrators, or assigns, on the security intended to be made by this present indenture, otherwise than by applying the money to arise from the sale of the produce to be consigned to them, or their order, in manner aforesaid, in or towards payment and satisfaction of the same. AND *it is hereby expressly declared by and between the said* [*mortgagors*] *and the said* [*mortgagees*], that, provided any money shall be expended in furnishing supplies to the said plantations, or in improving and cultivating thereof, under or by virtue of any

Covenant by mortgagees, while produce is consigned, not to call in mortgage money without giving six months' notice.

Monies advanced for supplies to be considered as duly applied.

order or authority in writing to be for that purpose given and exercised by the said [*mortgagors*], or the survivor of them, or the heirs, executors, or administrators of such survivor, or their or his assigns, or their or his attornies or agents, any expenditure so to be made by the said [*mortgagees*] shall be taken as a charge and incumbrance upon the said premises, and as a debt due in respect thereof, although the said sums shall not be fairly applied to the several purposes for which they may have been advanced: And that the receipt by the said [*mortgagees*], or the survivor of them, his executors or administrators, or their or his assigns, of such the order or authority for any of the purposes aforesaid, from any or either of them the said [*mortgagors*], their heirs, executors, administrators, or assigns, or their agent or agents, shall be full and conclusive evidence as between them and the said [*mortgagees*], of the due application of all sums of money to be by them paid, laid out, and expended, under and by virtue or in pursuance of any such order. And *it is hereby declared*, that the said trustees hereby nominated, or to be appointed, as hereinafter is mentioned, and their respective heirs, executors, and administrators, shall be charged and chargeable respectively only for such monies as they shall respectively actually receive, by virtue of the trusts hereby in them reposed, notwithstanding his or their, or any of their giving or signing, or joining in giving or signing, any receipt or receipts for the sake of conformity; and any one or more of them shall not be answerable or accountable for the other or others of them, or for the acts, receipts, neglects, or defaults of the other or others of them, but each and every of them only for his and their own acts, receipts, neglects, or defaults respectively; and that any one or more of them shall not be answerable or accountable for any banker, broker, or other person, with whom, or in whose hands, any part of the said trust-monies shall or may be deposited or lodged for safe custody or otherwise, in the execution of the trusts hereinbefore mentioned; nor for any misfortune, loss, or damage, which may happen in the execution of the aforesaid trusts, or in relation thereto, except the same shall happen by or through their own wilful default respectively. And, more

IN TRUST FOR SALE OF WEST INDIA ESTATE.

Indemnity to trustees.

IN TRUST FOR SALE OF WEST INDIA ESTATE.

especially, under no cases whatsoever shall be responsible for the dishonesty, negligence, insolvency, or misconduct of any attorney or agent to be by them employed in the Cairos aforesaid, or elsewhere in the West Indies, for the purpose of executing the trusts aforesaid, or recovering or remitting any part of the monies aforesaid, They the said trustees having accepted the trusts aforesaid upon the express condition of being wholly freed from any such responsibility. AND THIS INDENTURE FURTHER WITNESSETH, that, in pursuance and further performance of the said agreement, and in consideration of the premises, and in consideration of the further sum of 10*s.*, &c., He the said [*judgment and mortgage creditor*], at the request, and by the direction of the said [*mortgagors*] and [*mortgagees*] (testified respectively as hereinbefore is mentioned), *Hath* bargained, sold, assigned, transferred, and set over, And by these presents *Doth* bargain, &c., unto the said [*assignee in trust of judgment*], his executors, administrators, and assigns, The said bond or obligation of the —— day of ——, and the said judgment obtained by the said [*judgment and mortgage creditor*], as hereinbefore is mentioned, and the full benefit and advantage thereof respectively; *And* all sums of money to be had or obtained thereby; And all other the securities (if any) which he the said [*judgment and mortgage creditor*] hath or is in anywise entitled to for his said debt; And all the right, title, interest, property, possibility, claim, and demand whatsoever, of him the said [*judgment and mortgage creditor*], of, in, to, from, out of, and upon the same premises, and every of them, and every part and parcel thereof: To HAVE, HOLD, receive, and take the said bond or obligation and judgment, and all and singular other the premises lastly hereinbefore assigned, or expressed and intended so to be, unto the said [*assignee in trust of judgment*], his executors, administrators, and assigns, UPON TRUST for the said [*trustees for sale*], their heirs, executors, administrators, and assigns, and to be disposed of as they shall from time to time direct, for better enabling them to carry into execution the trusts hereinbefore declared; And in the meantime to permit and suffer the said judgment, so far as the same affects the hereditaments hereinbefore men-

Further *testatum.*

In consideration of the premises,

—judgment creditor assigns to trustee,

—bond and judgment.

—and all monies, &c.

Habendum.

Upon trust for trustees for sale.

And to attend the inheritance.

IN TRUST FOR SALE OF WEST INDIA ESTATE.

tioned to be hereby released, to wait upon and attend the inheritance of the same premises, so as to be subservient thereto, and to protect the same from all mesne incumbrances, if any such there be. *(Covenant by [judgment and mortgage creditor] that he has not incumbered). (Add power to appoint new trustees, ut ante,* Vol. 4, p. 303, *substituting for the words "the said trust fund shall be assigned and transferred," the words "the said trust estates, hereditaments, and premises shall be conveyed, assigned, and assured").* AND, for the considerations aforesaid, and in order that these presents, and the lease for a year upon which the same are grounded, may be duly recorded and registered, the said [*judgment and mortgage creditor*], [*mortgagors*], and [*mortgagees*] *Do*, and each and every of them *Doth* nominate, constitute, and appoint [*attornies*], of &c., and each of them, jointly and severally, their and each and every of their true and lawful attorney and attornies, either jointly or severally, to appear for them the said [*judgment and mortgage creditor*], [*mortgagors*], and [*mortgagees*], and for each and every of them, before the proper officer or officers of or for the Cairos aforesaid, or other place or places necessary and proper for that purpose, and then and there to acknowledge these presents and the lease for a year upon which the same are grounded, as their respective acts and deeds, and to do all other acts, matters, and things, which shall or may be required and expedient, in order to the registering and recording these presents and the lease for a year upon which the same are grounded, and for rendering the same valid and effectual, according to the laws, usages, and practice of the Cairos aforesaid, and for the purpose of authenticating and proving the same before any Court or Courts of Judicature, or upon any other occasion, or for any other purpose whatsoever. IN WITNESS, &c.

Appointment of attornies to acknowledge execution of deeds.

THE SCHEDULE marked A, to which the preceding indenture refers. *(Describe bills of exchange.)*

THE SCHEDULE marked B, to which the preceding indenture refers. *(Enumerate slaves, as required by Registry Act, ante,* Vol. 2, p. 247).

OF DIVIDENDS, AND REVERSIONARY INTEREST OF STOCK.

ASSIGNMENT *of* LIFE-INTEREST (*a*) *in Dividends of* 2000*l.*, 3*l.* PER CENT. CONSOLS, *and* APPOINTMENT *of* REVERSION *in same Stock by Mortgagor's* WIFE, UPON TRUSTS FOR SALE, *for* SECURING *a* SUM OF MONEY *and* INTEREST; *Usual* POWER *of* ATTORNEY, COVENANTS, *&c.; Recital of* POLICY *of* INSURANCE *effected by* MORTGAGEE *on the* LIFE *of* MORTGAGOR *as a collateral Security; Covenants by Mortgagor to keep Insurance on foot, attend at Insurance Office, &c. (A short Form).*

Parties.

THIS INDENTURE, made the —— day of ——, BETWEEN [*mortgagor*], of &c., of the first part; [*mortga-*

Whether tenant for life parting with his interest, has precluded himself from concurring in powers of advancement, &c.?

(*a*) Where a fund is settled on a person for life, with powers of advancement, changing trustees, or varying the securities, to be exercised by him or with his consent, it is often requisite to consider how far these powers are suspended by an alienation of the interest of the donee for life; and this, it will be evident, is a consideration of great importance to a purchaser or mortgagee; for, if these powers, to the exercise of which the act or assent of the tenant for life was made necessary for the protection of his interest, can be exercised after he has parted with such interest, it diminishes *pro tanto* the value of the purchase or security. The point arose in regard to powers of advancement, in the late case of *Noel* v. Lord *Henley*, 1 M'Clel. & Younge, 302, which was as follows:—

Thomas, Lord Viscount Wentworth, by his will devised his real estates to trustees, in trust for sale; and after payment of certain sums, he directed the residue of the money arising from the sale to be invested in the public funds, or on real security, at interest; and as to one moiety of the funds, in trust to pay the dividends and interest to the plaintiff, Thomas Noel, during his life, and after his decease to pay his wife an annuity of 200*l.* for life, and subject thereto upon trust to pay and transfer the said moiety of the stocks, funds, or securities, to, between, or among the children of T. Noel, as he should appoint; and in default of appointment, to the children equally. The will contained a power authorizing the trustees at any time or times after the decease

gor's wife], of &c., of the second part; and [*mortgagee*], of &c., of the third part. WHEREAS, by an indenture of

OF DIVIDENDS, AND REVERSIONARY INTEREST OF STOCK.

Recital of mar-

of the plaintiff, Thomas Noel, or in his life-time, *in case he should so direct by any writing or writings under his hand,* to levy and raise any part or parts (not exceeding one half) of the portion or portions intended to be thereby provided for the child or children. A suit was instituted for carrying into execution the trusts of the will, and the estates were sold under the direction of the Court. By indenture, dated 15th September, 1824, made between T. Noel of the first part; the petitioner S., of the second part; and the petitioner M., his trustee, of the third part, T. N. granted to S. a (redeemable) annuity of 92*l.* for his (T. N.'s) life; and by the same indenture assigned the moiety of the dividends from time to time during his life to become due on 15,163*l.* 9*s.* 5*d.* Consols, standing in the name of the Accountant-General, in trust, in the cause, to the account of the produce of the trust estates of Lord Wentworth, and to arise from any securities in which the monies produced from the said moiety to which he was entitled during his life, might be invested, unto M., &c., his executors, &c., in trust for securing the annuity, and to pay the residue unto T. N. A petition was now presented by the annuitant, and M. his trustee, praying that an order, dated the 24th of November, 1824, by which 2,500*l.* had been ordered to be raised and paid unto Noel the son, by virtue of an appointment made by his father, in pursuance of the power of advancement (but which had not yet been raised), might be discharged, and that the whole of the interest and dividends assigned by the indenture of grant of annuity might be paid to M. on the trusts thereby declared.

It was contended for the petitioners, that the dividends of the whole fund to which Noel, the father, was entitled for life, being assigned as a security for S.'s annuity, the Court could not dispose of any part of that fund without his consent; and of this opinion was the Lord Chief Baron (*Alexander*), who said: "The simple question here is, whether a tenant for life, with a power of appointment for the advancement of his children, can by his act preclude himself from exercising that power. On reference to the different authorities, it seems quite contrary to all of them, and to the principle on which those cases have been decided, that a tenant for life, having assigned the dividends of the whole of the fund to which he is entitled for life, as a security, should be at liberty to lessen that security, by exercising a power for advancement, and consequently diminishing the fund from which those dividends arise; and I must, therefore, discharge the order of the 24th of November, 1824."

Remark upon the doctrine of *Noel* v. Lord *Henley*.

It remains to be determined, how far the principle of the case of *Noel* v. Lord *Henley* applies to the other powers usual in settlements and wills,

OF DIVIDENDS, AND REVERSIONARY INTEREST OF STOCK.

settlement, bearing date on or about the —— day of ——, made between the said [*mortgagor*], of the first part; the said [*mortgagor's wife*], (then [*maiden name*] spinster), of the second part; and [*trustees*], of &c., of the third part; (being the settlement executed previously to the marriage of the said [*mortgagor*] and the said [*mortgagor's wife*]), the sum of 2000*l.* Consolidated three pounds *per cent.* Annuities, which, before the execution of the said indenture, had been transferred into the names of the said [*trustees*], was declared to be vested in them. *Upon trust*, to pay the dividends, interest, and annual produce thereof unto the said [*mortgagor*] or his assigns, or permit him or them to receive the same during his life; and after his decease, *Upon trust*, to pay the same dividends, interest, and annual produce unto the said [*mortgagor's wife*] or her assigns, or permit her or them to receive the same, during her life; and after her decease, *in trust*, as to the said sum of 2000*l.* Consolidated three pounds *per cent.* Annuities, for the children of the marriage as therein mentioned; and in default of such children, *in trust* for such person or persons, and for such intents and purposes, as the said [*mortgagor's wife*] should by any deed or deeds, or by her last will and testament, to be respectively executed or signed and published by her in the presence of, and attested by, one witness or more, direct or appoint; and, in default of such direction or appointment, *in trust* for the said [*mortgagor's wife*], her executors, administrators, or assigns, for her and their own use and benefit. AND WHEREAS the said [*mortgagee*] hath agreed to lend and advance unto the said [*mortgagor*] the sum of

riage settlement.

Agreement for loan.

as the power to appoint new trustees, vary securities, &c. Although these powers have not so immediate and direct an operation upon the income derived from the subsisting life interest as the power of advancement, the exercise of which involves the appropriation of part of the fund itself; yet it is obvious that the interest of the person entitled to the immediate income might be materially affected by an undue and improvident exercise of the powers in question; and therefore there is strong ground to contend that the person whose consent is made necessary to their execution, has, by parting with his interest in the fund, precluded himself from giving that consent. The point often arises in practice in regard to the power of appointing new trustees, and, in such a case, trustees willing to retire from the trusts are scarcely safe in doing so.

£——, at interest, on the security of the dividends arising from the said sum of 2000*l.* Consolidated three pounds *per cent.* Annuities, settled in trust for him during his life, as aforesaid, and also of the reversionary interest in the said annuities so as aforesaid limited, subject to the power of appointment of the said [*mortgagor's wife*] (*b*). And

OF DIVIDENDS AND REVERSIONARY INTEREST OF STOCK.

For insurance of mortgagor's life.

(*b*) The reversionary life interest of the wife is not included in the security, not being capable of alienation. Few points connected with modern conveyancing have attracted more general attention than the question as to how far the equitable *chose en action* of a married woman, not settled to her separate use, can be the subject of alienation; and its frequency of discussion has arisen not only from the great practical importance of the question, but from the contrariety of opinion that has, at different periods, been entertained upon it.

As to alienation of *choses en action* of married women.

It may be premised, that, whatever be the nature of the interest, whether contingent or vested, reversionary or immediate, the assignment by the husband, whether voluntary or for valuable consideration, is binding on himself and his representatives; and if, therefore, he survive the wife, or they are both living when the fund is reduced into possession, in either of which events he acquires an absolute interest (subject in the latter case to the wife's claim to a settlement), his assignment vests that interest in the assignee.

Husband's assignment binding on himself.

In the event, however, of the wife's surviving, it is now established by a train of decisions, that, in regard to an equitable *chose en action* in reversion, whether the interest be contingent or vested, and whether the assignee claim by virtue of the general assignment in bankruptcy, or under the Insolvent Debtors' Act, or by deed of assignment executed by the husband alone, or by the husband and wife jointly, (for the concurrence of the wife in these cases is immaterial, see *Wright* v. *Rutter*, 2 Ves. jun. 676), the claim of the wife is paramount to that of the assignee.

As to wife's claim by survivorship.

It will be proper briefly to trace the steps by which this doctrine has reached its present maturity; though some of the decisions respecting it have been stated at large in an anterior part of the present work. (*Vide ante*, Vol. 2, p. 77).

The cases of *Richards* v. *Chambers*, and *Seaman* v. *Duill*, 10 Ves. 580, (there stated), decided that the Court of Chancery would not allow a married woman to relinquish, by separate examination in Court, a *contingent* reversionary interest in a fund belonging to her*. And the cases of *Woollands* v. *Crowther*, 12 Ves. 174, and *Pickard* v. *Roberts*, 3 Mad.

* That such an interest is not assignable, see also *Lee* v. *Muggeridge*, 1 Ves. & Bea. 118.

OF DIVIDENDS, AND REVERSIONARY INTEREST OF STOCK.

WHEREAS, upon the treaty for the said loan, it was agreed that the same should be further secured by an assurance,

384, (*ante*, Vol. 2, p. 82), decided the same as to *vested* reversionary interests*. See also *Wade* v. *Saunders*, Turn. 306.

In *Mitford* v. *Mitford*, 9 Ves. 87, Sir *W. Grant*, M. R., held, that the general assignment in bankruptcy, of the husband, did not pass the wife's reversionary interest in certain stock in the funds, though the husband, who died in the life-time of the wife, was living at the time of the marriage of the prior legatee, on which event the wife became entitled in possession to the fund; and in *Gayer* v. *Wilkinson*, 1 B. C. C. 50, n., on which his Honor mainly grounded his determination, the circumstances and the decision were similar. In *Hornsby* v. *Lee*, 2 Madd. 16, (*ante*, Vol. 2, p. 80), Sir *T. Plumer*, V. C., decided in favour of the claim of the wife surviving her husband, to a contingent reversionary interest in stock, against the assignee of the husband, claiming by virtue of his assignment, under the Insolvent Debtors' Act, and also in opposition to the claim of the grantee of an annuity, to whom the husband and wife had assigned the interest in question for securing the annuity; though, in this case also, the husband lived a few days after the decease of the person entitled to the immediate life interest, but in which interval the fund was not reduced into possession.

Case of *Purdew* v. *Jackson*.

The last case, however, was not considered as concluding the question against the claim of the particular assignee of the husband and wife; but the doctrine was again agitated in the case of *Purdew* v. *Jackson*, 1 Russ. 1, where it received a most elaborate consideration from Sir *T. Plumer*, then Master of the Rolls. The case was as follows:—T. P., by his will, gave all the residue of his estate to trustees, to be converted into money and invested in bank annuities, in trust to pay the dividends to his daughter, T. P., during her life, and after her decease, to his grand-daughter, S. M., during her life, and after the decease of the survivor, to stand possessed of the annuities in trust for all and every the child and children of the said S. M., share and share alike, the shares of daughters to be paid at twenty-one, or marriage with consent. The trustee who proved the will, invested the residuary estate in the purchase of 5,350*l.* 3*l. per cent.* Consols, and the like sum of 3*l. per cent.* Reduced. In 1802, S. M. died, leaving seven children. In 1804, T. P. and the children of S. M. filed a bill against the trustees for carrying the trusts into execution. M. A., one of the seven children of S. M., intermarried with T. B., and in 1808 attained her age of twenty-one years. By an indenture, dated

* See farther, as to a *feme covert's* consent in Court, additional cases cited *ante*, Vol. 2, p. 83, 2nd ed.

to be effected by the said [*mortgagee*] on the life of the said [*mortgagor*], as hereinafter expressed, at the costs and

OF DIVIDENDS, AND REVERSIONARY INTEREST OF STOCK.

10th of October, 1812, T. B. and M. A. his wife, in consideration of 230*l.*, sold and assigned to J. R. one moiety of the seventh share of T. B. and M. A., in her right in the several sums of bank annuities, in which the residue of the testator's estate had been invested, expectant on the decease of T. P. In October, 1819, T. B. died, *leaving* M. A., *his widow, surviving,* who subsequently intermarried with L. *On the* 18*th September*, 1822, T. P., *the legatee for life, died.* L. and M. A., his wife, now presented a petition, praying that her one-seventh share of the stock composing the fund in Court might be paid to them. J. R. also presented a petition, claiming a moiety of the share by virtue of his assignment as purchaser. These petitions raised the general question, whether, where husband and wife by deed assigned to a purchaser for valuable consideration a moiety of a share of an ascertained fund, in which the wife had a vested reversionary interest, expectant on the death of a tenant for life of that fund, and both the wife and the tenant for life outlived the husband, the wife was entitled, by right of survivorship, to claim the whole of her share of the fund against such assignee—The Master of the Rolls, after a minute examination of the authorities, held L. and his wife to be entitled to the whole share against J. R. the purchaser. "I have always understood," said his Honor, "that the marital right of a husband to the *choses en action* belonging to the wife, is a qualified and not an absolute right. It is a right depending upon and subject to a condition, which is spoken of in the books uniformly in the same terms. Their language invariably is, that the husband is entitled to such *choses en action* of the wife as he reduces into possession; and that reduction into possession is a condition upon which alone the law gives them to him. 'Marriage,' says Lord Coke*, 'is an absolute gift of all chattels personal in possession in her (the wife's) own right, whether the husband survive the wife or no; but if they be in action, as debts by obligation, contract, or otherwise, the husband shall not have them unless he and his wife recover them.' If, then, the law gives to the wife who survives her husband, those *choses en action* belonging to her, which the husband did not reduce into possession, and if it is only by reduction into possession that he can bar her legal right, or prevent her from retaining that which the law otherwise declares to be her's, how can it be said that her legal right is gone, where, *de facto*, he did not reduce the *chose en action* into possession, or where the *chose en action* was in

Surviving wife held to be entitled to reversionary *chose en action* against her husband's assignee.

* Co. Litt. 355. b.

OF DIVIDENDS, AND REVERSIONARY INTEREST OF STOCK.

expense of the said [*mortgagor*]. And whereas, by a policy of assurance, bearing date the —— day of —— in-

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its very nature incapable of being reduced into possession in his life-time? To come to such a conclusion, we must hold that the husband's qualified right may be rendered absolute by something short of reduction into possession. We must alter the doctrine laid down in our books. It will no longer be true that the husband shall not have the chattels personal of the wife lying in action, unless he recover them or reduce them into possession during the continuance of the marriage. We must adopt a different phraseology, and have recourse to a substitute for reduction into possession, to something which shall be distinct from, yet tantamount to, that which has hitherto been regarded as a *sine qua non* in the completion of the husband's title. What is universally the effect of assignment for a valuable consideration? Is there any case in which assignment (especially of a *chose en action*, and unless where the doctrine of notice comes into application,) operates otherwise than by putting the assignee in the situation of the assignor? Can the assignor give what he does not possess? Can he pass more than all his right, title, and interest? Then, where the wife has a *chose en action*, which the husband cannot himself recover, how can he assign over to another the right to reduce it into actual possession? The husband's right is merely a right to obtain possession of the subject when the period arrives at which his wife is entitled to the possession of it; and if he dies in the meantime, leaving his wife surviving, his right is gone, and the right of the surviving wife takes effect. The assignee for valuable consideration, with notice, must take the right as the husband himself had it; he buys the chance of the husband's out-living the wife, or of the reversionary *chose en action* falling into possession during the coverture, and he must wait to see how the event turns out. Suppose that a married woman is entitled to a bond debt, payable upon the death of A. B., if her husband assigns this for a valuable consideration during coverture, and if he dies in the life-time of A. B., in whose name would an action on the bond be brought? The assignee could not bring his action in the name of the husband; he would be obliged to bring it in the name of the wife: but what obligation would she be under to recover this debt on behalf of the assignee, or what right would he have to use her name for such a purpose? The husband might contract that the assignee should be at liberty to sue in his name at any time, or in the name of him and his wife during the continuance of the coverture; but could he give authority to a stranger to sue in her name after his own decease? The bond debt was a *chose en action;* assignment could not alter its nature; and, continuing to be a *chose en action*, it would be the absolute property of the surviving wife. It is admitted

Wife's right by survivorship to her legal *choses en action.*

stant, under the hands and seals of three of the directors of the —— Assurance Company, numbered ——, the sum

OF DIVIDENDS, AND REVERSIONARY INTEREST OF STOCK.

that an assignment in bankruptcy does not deprive the bankrupt's wife of her right by survivorship to her reversionary *choses en action:* now, where is the difference between that species of assignment and an assignment to an individual for valuable consideration? If the wife's right is to prevail only as between her and her husband, and not where third parties acquire an interest, why is it not barred in the former case, as well as in the latter? It is said, that an assignment for valuable consideration to a particular assignee changes the property; but in bankruptcy also the property is changed; every thing being transferred to the assignees, which the bankrupt himself could lawfully depart with."

No difference between assignment in bankruptcy and assignment to a particular assignee.

The case of *Purdew* v. *Jackson* has been followed in several subsequent cases, (*Honnor* v. *Morton*, April, 1828; *Crowder* v. *Stone*, August, 1828; both decided by Lord *Lyndhurst);* and these cases may now be considered to have placed the point in question beyond the reach of controversy.

As to the operation of the husband's assignment on the wife's *immediate choses en action.*

It will be observed, that, in *Purdew* v. *Jackson*, the Master of the Rolls cautiously abstained from expressing an opinion as to what would be the effect of the husband's assignment where the *chose en action* was immediate, and not as in that case reversionary; though his Honor's reasoning, which went to prove that an assignee could be in no better situation than the husband, evidently led to the conclusion that the assignment did not, in construction of law, operate as a reduction into possession, and therefore was inoperative to vest the property in the assignee. In fact, the point had been substantially decided by the same learned Judge in the case of *Hornsby* v. *Lee*, where the husband survived the event upon which the reversionary interest was expectant. It is remarkable, however, that his Honor in that case treats the question as being, simply, whether the husband could alien his wife's contingent reversionary interest, and does not once advert to the circumstance of the husband having out-lived the legatee for life, though this formed so material a feature in the case, and, it is conceived, reduced it to the simple question, whether the husband's assignment for a valuable consideration of his wife's *immediate* equitable *choses en action* was good against her surviving him; for, it makes no difference whether the assignment by the husband is made before or after the fund ceases to be reversionary, *provided he survive that event. Honnor* v. *Morton*, 3 Russell, 65. It is still more remarkable, that Sir *T. Plumer*, who decided *Hornsby* v. *Lee*, on a subsequent occasion stated it as quite clear that the assignment for valuable consideration by a husband, as distinguished from a voluntary alienation (which was the nature of the instrument in the case before him), was a reduction into pos-

OF DIVIDENDS, AND REVERSIONARY INTEREST OF STOCK.

of £—— is assured to be paid to the said [*mortgagee*], his executors, administrators, or assigns, within —— calendar

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session of the wife's immediate *choses en action* (see *Johnson* v. *Johnson*, 1 Jac. & Walk. 476),—a position which is not only at variance with his Honor's decision in *Hornsby* v. *Lee*, viewed with reference to the circumstance of the husband having survived the event upon which the fund became immediate, and with the reasoning of the same learned Judge in *Purdew* v. *Jackson*, but also with the case of *Mitford* v. *Mitford* (where, it will be remembered, the husband also survived such event), unless a distinction can be sustained between the assignment in bankruptcy, and an assignment to a particular assignee for a valuable consideration; and against the existence of such a distinction Sir *T. Plumer* strenuously contends in his judgments, both in *Hornsby* v. *Lee* and *Purdew* v. *Jackson**; and Sir *W. Grant*, in his judgment in *Mitford* v. *Mitford*, evidently considers such a distinction to be unsubstantial. Upon principle, it is certainly difficult to discover any sound reason for placing the husband's assignee in a better situation than himself; or, in other words, for declaring the assignment to operate as a reduction into possession, when the assignee is obliged to take the same steps for the actual recovery of the *chose en action* as the husband himself must have done. Such a doctrine, too, is inconsistent with the rule governing legal *choses en action* (as bonds, &c.), which, not being assignable at law, are not prevented by the husband's assignment from surviving to the wife, nothing but an actual reduction into possession having this effect. In strict analogy, therefore, equitable interests ought not to be affected by the husband's assignment. (See 9 Ves. 99).

It may be noticed that *Hornsby* v. *Lee* has been treated as the case of a *reversionary* interest, by Mr. Roper in his Treatise on the Law of Husband and Wife, Vol. 1, p. 225; where he comments at large, and animadverts upon the decision; and his objection to it would probably have been still more decided, if he had considered it as the case of an *immediate* interest; for this respectable writer seems not to entertain a doubt that *choses en action* of this description belong to the husband's assignee, claiming under his assignment for valuable consideration. Rop. Husb. and Wife, Vol. 1, p. 256. Antecedently to the case of *Mitford* v. *Mitford*, perhaps, this might have been the better conclusion upon the authorities, though

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* That there is no distinction between general assignees in bankruptcy and particular assignees for a valuable consideration in regard to the wife's equity to a settlement out of an equitable fund, both alike being bound by that equity, *vide post*, p. 574.

OF DIVIDENDS, AND REVERSIONARY INTEREST OF WIFE.

[illegible] after proof as therein mentioned of the decease of the said [mortgagor] to the said [mortgagee], his executors,

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they are entitling; *see Bovil v. Brander*, 1 P. W. 458; *Grey v. Kenind*, 1 Atk. 280, more correctly stated 1 P. W. 459, Cox's n.; *Gayer v. Wilbourn*, 1 B. C. C. 50, Belt's ed. n.; *S. C.* 2 Dick. 492; *Pringle v. Hodgson*, 3 Ves. 617; *Bates v. Dandy*, 2 Atk. 207; Earl of [illegible] 4 Ves. 122. *See also Lord Cornwall v. Freshed*, 2 P. W. 137; *Saddington v. Kinsman*, 1 B. C. C. 44, 51); but having regard to the usual circumstances of that case as before adverted to, and those of *Hornby v. Lee* as well as the principle as laid down by *Sir Thomas Plumer* in *Purdew v. Jackson*, which seem to accord with the more early expressed opinion of Lord Hardwicke in *Wright v. Rowe*, 2 Ves. jun. 677, the modern decisions certainly preponderate the other way; and a recent adjudication of *Sir John Leach*, when Vice Chancellor, [illegible] has not pronounced to point, is still more direct authority upon the point. The case alluded to is *Chapman v. Curtis*, and was as follows:—T. Rutherford, by his will, dated the 1st of June, 1803, devised to his wife Mary, during her life, certain freehold hereditaments, and after her decease to trustees, upon trust, to receive the rents, and place the same out at interest until the youngest child of testator's daughter, Mary Jakens, living at the age of twenty-one years, should attain that age, and then upon trust to sell, and the proceeds to arise from the sale with the accumulated rents thereof to be equally divided between the children of his said daughter Mary Jakens, share and share alike, giving the shares of children dying before their shares should become payable, leaving issue, to such issue. The testator's widow survived him, and died in October, 1804. Mary Jakens had five children, one of whom was the wife of William Chapman. The present suit was under the direction of the Court of Chancery, a suit having been instituted to enforce the execution of the trusts of the will.* Before the construction of the two-

[Synopsis case of Chapman v. Curtis.]

[Surviving wife]

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* A suit instituted by husband and wife to enforce the payment of a legacy given to the wife, though there has been a decree for an account, or even for payment, is clearly not a reduction into possession, the case being analogous to that of a judgment at law or an action brought by them, which has no such effect in regard to a legal chose. *Adams v. Lowndes*, 1 M. Cl. & Young. 41; nor a possession taken up by the husband in the character of trustee operates as such. *Bates v. Hall*, 12 Ves. 497. Actual payment of a legacy to the husband is sufficient to bar the wife, though to the detention of her prior separate [illegible] for life. *Donnell v. Earle*, 12 Ves. 473. *See* further as to what

[Where sum of the husband entitled to a reversion not possession.]

OF DIVIDENDS, AND REVERSIONARY INTEREST OF STOCK.

administrators, or assigns paying yearly and every year during the life of the said [*mortgagor*], the premium or

held to be entitled to her immediate *chose en action* against husband's assignee.

nies arising from the sale, William Chapman and Mary his wife, by indenture dated the 18th of August, 1818, in consideration of 500*l.*, granted a redeemable annuity to John Jones, and assigned to a trustee for him their share in her right in the accumulated rents and monies to arise from the sale, for the purpose of securing the annuity. In June, 1822, William Chapman took the benefit of the Insolvent Debtors' Act, and afterwards died, leaving Mary Chapman his widow surviving him. The question was, whether the widow was entitled to her fifth share of the fund in Court, in opposition to the annuitant and the provisional assignee under the Insolvent Debtors' Act; and the Vice Chancellor, after hearing the arguments of counsel, made an order *directing the payment of the whole to her*.—In Chancery, 3rd of April, 1828, MS. The same learned Judge has also decided, that, where the wife of a bankrupt was entitled to an immediate legacy, and the husband died after a bill filed by the assignee against the executors to compel payment, the surviving widow, and not the assignee, was entitled to the legacy; neither the commissioners' assignment, nor the filing of the bill, being a reduction into possession. His Honor grounded his decision chiefly on the authority of the case of *Gayner* v. *Wilkinson*, 1 B. C. C. 50, n., and on the analogy of the rule at law, under which the widow would be entitled to a legal *chose en action* if the husband died after an action commenced, but before execution. *Pierce* v. *Thornely*, 2 Sim. 167.

Assignee takes subject to wife's equity.

It should be observed that, not only is the husband's assignment inoperative to bar the wife's claim by survivorship, but also to affect her equity to a settlement out of the fund. This claim is founded on a long established rule, that, where property given to the wife cannot be obtained by

Nature of wife's claim to a settlement.

the husband without the intervention of a Court of equity, equity will compel the husband or his assignee to make a settlement on the wife and her children, of a proportion of the fund, such proportion being generally one half; *Worrall* v. *Marlar*, 1 Cox's P. W., 459, n.; *Brown* v. *Clark*, 3 Ves. 166; *Stamper* v. *Barker*, 5 Madd. 164; *Steinmetz* v. *Halthin*, 1 Glyn. & Jam. 64; *Ex parte O'Farrall*, Ib. 347; but is liable to variation according to circumstances. In settling the *quantum* of the provision, the extent of the wife's fortune, and the fact, whether there has been a previous settlement, are proper to be taken into consideration; *Bond* v. *Simmons*, 3 Atk. 20; *Elibank* v. *Montolieu*, 5 Ves. 744; *Green* v. *Ottie*,

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amounts to a reduction into possession of the wife's *choses en action*, *Lightbourne* v. *Holyday*, 2 Eq. Ca. Ab. 1; *S. C.* 2 Madd. 135, n.; *Wildman* v. *Wildman*, 9 Ves. 176; *Nash* v. *Nash*, 2 Madd. 133).

sum of £ ——, which said annual premium will become payable on the —— day of ——. NOW THIS INDEN-

OF DIVIDENDS, AND REVERSIONS AND INTEREST OF MONEY

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1 Ves. & Bea. 73); but the Court, under any circumstances, never restrains the whole to be settled. *Peregrine v. Hobson*, 1 Madd. 368. Though the settlement is made on the children as well as the wife, yet the claim of the children is merely derived through her; and if she dies before a settlement is made, or before, it seems, a suit has been filed, the children, having no original title, can claim nothing. *Brown v. Tapley*, Amb. 561; 1 Cox, 352; *Lloyd v. Williams*, 1 Madd. 452; *Newman v. Newman*, 1 Coxe & Pan. 64. And the wife may waive the provision, as well as those issued on her own, at any time before the actual execution of the settlement, though there has been a decree directing it to be; but she cannot have the property settled upon herself and issue of the marriage. *Murray v. Lord Elibank*, 13 Ves. 6; and see *Johnson v. Johnson*, 1 Jac. & Walk. 472. The wife's consent is taken in Court or before commissioners, separately from her husband, unless the sum to be secured is less than 200*l.*, when it is paid on their joint petition without a separate examination. 1 Jac. Rep. Husb. & Wife, 246. Before a suit instituted, claiming a settlement, a trustee may, it seems, pay over the personal property to the husband, without the consent of the wife, but not afterwards. See *Mountney v. Parlow*, 4 Ves. 13; *Murray v. Elibank*, 13 Ves. 30.

The wife's claim to a settlement out of her equitable choses in action may be barred by some implied contract. If, therefore, there is a settlement made upon the wife previously to marriage, from which the intention can be collected that the husband shall take property of the description accruing during the coverture, and a clause to this effect is common in settlements, he will become absolutely entitled; *Essex v. Essex*, 14 Ves. 205; and see *Cleland v. Cleland*, Pre. Ch. 64; *Heaton v. Hassell*, 4 Bro. P. C. 46, pl. 11, n.; *Adams v. Cole*, Cas. Temp. Talb. 152; but the mere fact of a settlement being made upon the wife, without some evidence of such intention, is not sufficient. It must be shewn that he has covenanted to become the purchaser of the future property of the wife. *Salway v. Salway*, Amb. 692; *Goodrich v. Brockley*, 2 Ves. sen. 575; *Burton v. Dean*, 2 Ves. jun. 607; *Lady Elibank v. Montolieu*, 5 Ves. 737; *Druce v. Denison*, 6 Ves. 385; *Mitford v. Mitford*, 9 Ves. 87; *Carr v. Taylor*, 10 Ves. 574; (see these cases stated 1 Bro. Husb. & Wife, 256, & seq.) For a settlement on the wife, of such a proportion of the fund as the Court would have settled, will, it seems, be a satisfaction of her equity. See *Stamper v. Barker*, 5 Madd. 164*.

TENANTS.

Wife's claim may be barred by a settlement.

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* But the settlement here was not such as the Court would have directed, being upon the wife alone, and not upon her and her children.

OF DIVIDENDS, AND REVERSIONARY INTEREST OF STOCK.

TURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the sum of £—— of

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Equity of wife binding on her husband's assignees.

That the equity of the wife for a settlement is binding on the husband's assignees in bankruptcy has long been settled; *Jacobson* v. *Williams*, 1 P. W. 382; *Watson* v. *Mascall*, cit. 2 Atk. 419; but it was considered doubtful, until a much more recent period, whether the rule extended to his assignee for a valuable consideration; *Franco* v. *Franco*, 4 Ves. 515; *Wright* v. *Morley*, 1 Ves. 20; though the affirmative had been decided by Lord *Hardwicke*, in *Jewson* v. *Moulson*, 2 Atk. 417, and by Lord *Northington*, in the Earl of *Salisbury* v. *Newton*, 1 Ed. 376; and Lord *Alvanley*, in *Macaulay* v. *Philips*, 4 Ves. 19, had unequivocally expressed himself to be of the same opinion. The doctrine too, was distinctly admitted by Sir *Thomas Plumer*, M.R., in the late case of *Johnson* v. *Johnson*, 1 Jac. & Walk. 477, and by Sir *John Leach*, V.C., in *Elliott* v. *Cordell*, 5 Madd. 155, and may now be considered as settled law. Assignees in law, however, are not for *every* purpose on an equal footing with a particular assignee for valuable consideration; for though it has been held that the wife of a bankrupt, who had a life interest in stock, was entitled to a provision for maintenance out of it, as against his assignees; *Prior* v. *Hill*, 4 B. C. C. 138; yet the contrary was decided by the Vice Chancellor, in the beforementioned case of *Elliott* v. *Cordell*, as against a *purchaser*. See also *Morley* v. *St. Alban*, 11 Ves. 12. See further as to the wife's equity, Mr. Roper's Law of Husb. & Wife, Vol. 1, p. 256, *& seq.* The last edition of this work, by Mr. Jacob, contains much additional valuable information.

As to *life* interests.

Situation of mortgagee of equitable *choses en action* of *feme covert*.

It may be useful to sum up the doctrine stated in this note, by shewing in what situation it places a mortgagee who has a security on the equitable *choses en action* of a married woman—it is simply this: If the interest be reversionary, and the wife dies while it is in that state, leaving the husband surviving, the mortgagee becomes entitled to the whole fund. If, on the other hand, the *husband* dies while the interest continues reversionary, leaving the *wife* surviving, the wife is entitled to, and the mortgagee loses the whole. If the husband and wife are both living when the event happens upon which the reversion is expectant, the mortgagee is then entitled, subject to the wife's claim to a settlement; (he ought, in this case, to lose no time in reducing it into possession, for, should the husband die before this is done, the wife would take the whole by survivorship). The same rules apply where the interest, which is the subject of the security, was originally immediate, as where it becomes so in the life-time of the husband and wife, subsequently to the execution of the instrument.

As, however, it was held to be altogether void against the wife, (the subject being a reversionary interest, which survived to her), the point, as to the sufficiency of the settlement to bar the wife's equity, did not arise.

lawful money of Great Britain and Ireland, paid by the said [*mortgagee*] to the said [*mortgagor*], at or before the execution of these presents, the receipt of which said sum the said [*mortgagor*] doth hereby acknowledge, and from the same sum and every part thereof doth acquit, release, and for ever discharge the said [*mortgagor*], his executors, administrators, and assigns, The said [*mortgagor*] *Hath* bargained, sold, assigned, and transferred, and by these presents *Doth* bargain, &c. unto the said [*mortgagee*], his executors, administrators, and assigns, ALL THOSE the dividends of the said sum of 2000*l.* Consolidated three pounds *per cent.* Annuities, limited in trust for the said [*mortgagor*] in and by the said recited indenture of the —— day of ——, or intended so to be; And all and every sums and sum of money henceforth to become due to the said [*mortgagor*] in respect of the dividends, interest, or annual produce to arise from the stocks, funds, and securities, whereon the produce of the said sum of 2000*l.*, Consolidated three pounds *per cent.* Annuities, shall, by virtue of the trusts of the said indenture for the time being, happen to be invested; AND *ALSO all the right, title, interest, claim, and demand whatsoever, both at law and in equity, of the said [*mortgagor*], in, to, or out of the same dividends and premises: To HAVE AND TO HOLD the said dividends, sum or sums of money, or other the premises hereby assigned, or intended so to be, with all benefit and advantage thereof, unto the said [*mortgagee*], his executors, administrators, and assigns, henceforth absolutely during the natural life of the said [*mortgagor*], or for all other the interest of him the said [*mortgagor*] therein, *Upon the trusts*, and for the intents and purposes hereinafter declared concerning the same. AND THIS INDENTURE FURTHER WITNESSETH, that, for the considerations hereinbefore expressed, the said [*mortgagor's wife*], by virtue and in exercise of the power and authority reserved to her in and by the said hereinbefore in part recited indenture of settlement, and of every other power enabling her in this behalf, *Doth* by this deed, executed by her in the presence of the person or persons whose name or names is or are indorsed on these presents, as a witness or witnesses to

OF DIVIDENDS, AND REVERSIONARY INTEREST OF STOCK.

Mortgagor in consideration of mortgage money.

[*576]

Further *testatum.*

Mortgagor's wife appoints reversionary interest in fund to mortgagee, upon the trusts after declared.

OF DIVIDENDS, AND REVERSIONARY INTEREST OF STOCK.

the execution thereof by her the said [*mortgagor's wife*], absolutely and irrevocably direct and appoint that ALL THAT the said sum of 2000*l.* Consolidated three pounds *per cent.* Annuities, mentioned and comprised in the hereinbefore recited indenture of settlement, and all and singular the stocks, funds, and securities whereon the monies to arise and be produced therefrom shall from time to time, by virtue of the trusts of the same indenture, happen to be invested, and all the right, title, property, and interest therein, over which the said [*wife*] has any power of disposition or appointment as aforesaid, shall, from and immediately after the decease of the said [*mortgagor*] and of her the said [*mortgagor's wife*], and subject to the trusts declared by the same indenture in favour of the children of them the said [*mortgagor*] and [*mortgagor's wife*], absolutely remain, continue, and be unto the said [*mortgagee*], his executors, administrators, and assigns, upon the trusts and for the intents and purposes hereinafter declared concerning the same. AND, for the considerations aforesaid, the said [*mortgagor*] and [*wife*], his wife, *do*, and each of them *doth* hereby irrevocably constitute and appoint the said [*mortgagee*], his executors or *administrators, their and each of their attorney and attornies, with full power and authority for him and them, in the name or names of the said [*mortgagor*] and [*wife*], or either of them, their or either of their executors or administrators, or otherwise, but at the costs and charges of the said [*mortgagor*], his executors, administrators, or assigns, to ask and demand, sue for, recover, and receive from all persons whom it may concern, the said dividends, annuities, and premises respectively hereby assigned and appointed, or intended so to be, or any part thereof, and to give effectual discharges for the same, and to do and execute all such other acts, matters, and things, as may be expedient for deriving the full benefit of the assignment hereby made; and to appoint from time to time a substitute or substitutes for all or any of the purposes aforesaid; the said [*mortgagor*] and [*wife*], his wife, hereby respectively ratifying and confirming, and agreeing to ratify and confirm whatsoever the said attorney or attornies, or his or their substitute or substitutes, shall lawfully

Power of attorney.

[*577]

do or cause to be done in or about the premises. AND *it is hereby declared and agreed by and between the said parties to these presents*, that the said [*mortgagee*], his executors, administrators, and assigns, shall stand possessed of the dividends and reversionary interest respectively hereinbefore assigned and appointed, or intended so to be, of and in the said sum of 2000*l.* Consolidated three pounds *per cent.* Annuities, and also of the said hereinbefore recited policy of assurance, *Upon the trusts*, and for the intents and purposes hereinafter declared concerning the same, that is to say, UPON TRUST, that if the said [*mortgagor*] and [*wife*], his wife, or either of them, their or either of their executors, administrators, or assigns, do and shall, on the —— day of —— now next ensuing, at or in the common dining hall of the Middle Temple, London, pay or cause to be paid unto the said [*mortgagee*], his executors, administrators, or assigns, the sum of £—— of lawful money of Great Britain and Ireland, with interest for the same after the rate of 5*l.* for every 100*l.*, by the year, from the day of the date of these presents, without any deduction or abatement whatsoever, then the said [*mortgagee*], his executors, administrators, or assigns, shall and will, on the request and at the *costs of [*578] the person or persons paying the same, re-assign and reassure the said dividends, annuities, and premises respectively hereby assigned and appointed, or intended so to be, and also the said hereinbefore recited policy of assurance, unto such person or persons as he or they shall direct or appoint, freed from all incumbrances to be made, done, or committed by the said [*mortgagee*], his executors, administrators, or assigns in the meantime. BUT in case default shall be made in payment of the said principal sum and interest, at the time and in the manner hereinbefore provided for payment of the same, Then UPON TRUST that the said [*mortgagee*], his executors, administrators, or assigns, do and shall, and he and they is and are hereby authorized and empowered, of his and their own proper authority, without any further consent or concurrence of the said [*mortgagor*] and [*wife*], his wife, or either of them, or the executors or administrators of either of them, to sell and absolutely dispose of the said

OF DIVIDENDS, AND REVERSIONARY INTEREST OF STOCK.

Mortgagee to stand possessed of dividends, &c.

Upon trust to re-assign on payment of mortgage money.

In default of payment, upon trust to sell.

OF DIVIDENDS, AND REVERSIONARY INTEREST OF STOCK.

dividends, annuities, and other the premises respectively hereby assigned and appointed, or any part thereof, and the said hereinbefore recited policy of assurance, either by public auction or private contract, with liberty to buy in the same at any auction or auctions, without being responsible for any loss or expense (*c*) occasioned thereby, and assign and assure the same, when sold, to the purchaser or purchasers thereof, or as he, she, or they shall direct: AND UPON FURTHER TRUST, that the said [*mortgagee*], his executors, administrators, or assigns, do and shall, out of the proceeds of such sale or sales, retain and pay to and for himself or themselves respectively, the principal and interest monies hereby intended to be secured, which shall then be due and owing to the said [*mortgagee*], his executors, administrators, or assigns, and all costs, charges, and expenses attending such sale and the execution of the said trusts hereby reposed in him and them, and pay and assign the residue or surplus (if any) of the said proceeds, after such payments and deductions as aforesaid, unto the said [*mortgagor*] and [*wife*], his wife, [*579] *or one of them, their or one of their executors, administrators, or assigns, according to his, her, or their interests therein respectively. AND *it is hereby declared*, that the receipt or receipts of the said [*mortgagee*], his executors, administrators, or assigns, for any sum or sums of money to be received by him or them in the execution of the trusts hereinbefore contained, shall effectually discharge the person or persons paying the same from all responsibility in respect of the application thereof. AND the said [*mortgagor*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*mortgagee*], his executors, administrators, and assigns, (*to pay principal money and interest, ut ante*, p. 425); And that they the said [*mortgagor*] and [*wife*], his wife, respectively, have full power and absolute authority by these presents to assign and appoint the said dividends, annuities, and pre-

Declaration of trusts of purchase monies.

Receipts of mortgagee to discharge purchasers.

Covenants by mortgagor,

—that he and his wife have good right to assign;

(*c*) *Vide ante*, p. 261. As it is now intended to subject property bought in at auctions to the duty, a clause to this effect seems to be the more necessary.

mises respectively, hereinbefore mentioned or expressed to be hereby assigned and appointed, or intended so to be, in manner aforesaid, free from all charges and incumbrances (*d*) whatsoever, at any time or times heretofore cre-

OF DIVIDENDS, AND REVERSIONARY INTEREST OF STOCK.

Free from incumbrances.

(*d*) The danger of the existence of prior incumbrances constitutes the great objection to reversionary interests, as the subject of a security or purchase; for the person assuming to be owner, having no claim either to the title deeds or possession, which are the usual *primâ facie* evidences of unincumbered ownership in regard to lands and chattels, no inference unfavourable to his right so to deal with the property is to be drawn from the absence of these *indicia* of title; and, consequently, the means of detecting and guarding against fraud are proportionably diminished.

Dangers attending securities on reversionary interests.

Of late years, however, a doctrine has sprung up, which goes far towards removing this objection as to equitable interests in property which is vested in trustees; and it is this: that where there are several incumbrancers or purchasers of the same fund, he that first gives notice to the person having the legal title, will prevail: such notice, in regard to *choses en action*, being considered as tantamount to the delivery of possession of chattels, which are capable of manual transfer. Suppose, therefore, a legatee mortgages or sells an unreceived legacy to two persons in succession, if the second mortgagee or purchaser, not being apprised of the former transaction, gives notice to the executor of his claim before the first, such second mortgagee or purchaser acquires a superior title.

Priority gained by notice to trustees.

This rule has been considered as indirectly sustained by some early decisions; but until two recent adjudications, which will be presently noticed, the doctrine could not be relied upon, and was too important in principle, as well as in its practical consequences, to be implicitly received, without the sanction of express and undeniable authority: for it gives to notice to the trustees precisely the same operation, which, by the registry acts, belongs to the registration of instruments. It seems, however, now to be fully established by two recent cases, which the Editor is enabled to lay before his readers by the kindness of Mr. Russell, since reported by that gentleman, 3 Russ. 1. The first of these cases is *Dearle* v. *Hall**, which was as follows—

Foster v Cockerell 3 Cl & Fin 456

Peter Brown, by his will, dated 11th of September, 1794, directed his executrix and executors to invest one moiety of the residue of his personal estate, and of the money to arise from the sale of his real estates, on government or real security, during the life of his son Zachariah Brown,

Case of *Dearle* v. *Hall*.

* In the Register's book, the title of the cause is *Dearle* v. *Brown*.

OF DIVIDENDS, AND REVERSIONARY INTEREST OF STOCK.

ated, occasioned, or suffered by the said [*mortgagor*] and [*wife*], or either of them, or any other person or persons

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and pay the interest to him during his life. The executors invested the residue pursuant to the testator's directions, and Z. B.'s share of the interest amounted to about 93*l.* a-year. By an indenture, bearing date the 19th of December, 1808, Z. Brown, in consideration of 204*l.*, granted to the plaintiff Dearle a redeemable annuity of 37*l.* during his (Z. B.'s) life, and assigned his interest in the yearly sum of 93*l.*, to which he was entitled under the will of his father, upon trusts for securing it. By another indenture, dated the 26th of September, 1809, he granted a similar annuity to the plaintiff Sherring, and again assigned the 93*l.* a-year upon similar trusts for securing it. A memorial of both these securities was enrolled, but *no notice of them was given to the trustees in whose names the fund was standing*. Notwithstanding the preceding incumbrances, Brown, in 1812, advertised his life interest in the 93*l.* for sale, as an unincumbered property, and this advertisement led to a negotiation with the defendant Hall, who proposed to become the purchaser. Hall's solicitor used all due diligence in scrutinizing Brown's title; and in a correspondence which took place between him and the acting executor, he inquired the exact amount payable to Brown, and called for every information respecting the fund and the title. The executor not being aware of the preceding incumbrances, of course this correspondence elicited no information from him on the subject. Under these circumstances, the contract with Hall was carried into execution by an indenture, dated the 20th of March, 1812, by which Brown, in consideration of 711*l.* 3*s.* 6*d.* assigned the dividends in question to Hall, covenanting that the fund was free from incumbrances. On the 25th of April following, Hall served a notice on the executors of Peter Brown, requiring them to pay the dividends to him; and accordingly, in July, they remitted him 31*l.* 12*s.* 2*d.* on account of such dividends. On the 17th of October following, they received for the first time notice of the assignments to Dearle and Sherring, and thenceforth declined to make further payments. Dearle and Sherring then filed a bill against Hall, Z. Brown, and the executors of Peter Brown, for the payment of their respective annuities, alleging the priority of their securities, and contending that Hall's prior notice was no ground for postponing them; and also, that he had been guilty of laches in not searching at the proper offices for a memorial of the annuities. Sir *Thomas Plumer*, M. R., however, decided against the plaintiffs. After commenting at large upon the circumstances of the case, his Honor said, "The ground of the plaintiffs' claim is priority of time; they rely upon the known maxim borrowed from the civil law, which in many cases regulates equities, *qui prior est in tempore, potior est in jure*."

Purchaser of dividends of stock preferred to prior incumbran-

whomsoever: *And also* that the said [*mortgagor*] and [*wife*], or the executors or administrators of the said

Not to release or discharge the dividends, &c.

"If, by the first contract, all the thing is given, there remains nothing to be the subject of the second contract, and priority must decide. But it cannot be contended, that priority in time must decide, where the legal estate is outstanding; for the maxim, as an equitable rule, admits of exceptions, and gives way, when the question does not lie between bare and equal equities. If there appears to be, in respect of any circumstance independent of priority of time, a better title in the puisne purchaser to call for the legal estate than in the purchaser who precedes him in date, the case ceases to be a balance of equal equities, and the preference, which priority of date might otherwise have given, is done away with and counteracted." "The question here is, not as in *Evans* v. *Bicknell*, (6 Ves. 192), whether a Court of Equity is to deprive the plaintiffs of any right; to take from them, for instance, a legal estate, or to impose any charge upon them: it is simply, whether they are entitled to relief against their own negligence. They did not perfect their securities; a third party has innocently advanced his money, and has perfected his security as far as the nature of the subject permitted him. Is this Court to interfere to postpone him to them? They say, that they were not bound to give notice to the trustees, for that notice does not form part of the necessary conveyance of an equitable interest. I admit, that, if you mean to rely on the contract with the individual, you do not need to give notice: from the moment of the contract, he with whom you are dealing is personally bound. But, if you mean to go further, and to make your right attach upon the thing, which is the subject of the contract, it is necessary to give notice; and unless notice is given, you do not do that which is essential in all cases of transfer of personal property. The law of England has always been, that personal property passes by delivery of possession, and it is possession which determines the apparent ownership. It is true that a *chose en action* does not admit of tangible actual possession, and that neither Z. Brown, nor any person claiming under him, were entitled to possess themselves of the fund which yielded the 93*l.* a-year. But in *Ryall* v. *Rowles*, 1 Ves. sen. 484, the judges held, that, in the case of a *chose en action*, you must do every thing towards having possession that the subject admits; *you must do that which is tantamount to obtaining possession, by placing every person who has an equitable or legal interest in the matter under an obligation to treat it as your property; for this purpose, you must give notice to the legal holder of the fund. In the case of debt, for instance, notice to the debtor is tantamount to possession; if you omit to give that notice, you are guilty of the same degree and species of neglect as he who leaves a personal chattel, to which he has acquired a title, in the*

ces, on the ground of earlier notice to the trustees.

or revoke the power of attorney.

[*wife*], will not, at any time or times hereafter, release or discharge the said dividends, annuities, and premises,

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actual possession, and under the absolute control of another person. Is there the least doubt, that, if Z. Brown had been a trader, all that was done by Dearle and Sherring would not have been in the least effectual against his assignees; but that, according to the doctrine of *Ryall* v. *Rowles*, his assignees would have taken the fund, because there was no notice to those in whom the legal interest was vested. In that case, it was the opinion of all the judges, that he who contracts for a *chose en action*, and does not follow up his title by notice, gives personal credit to the individual with whom he deals. Notice, then, is necessary to perfect the title; to give a complete right *in rem*, and not merely a right as against him who conveys his interest. If you are willing to trust the personal credit of the man, and are satisfied that he will make no improper use of the possession in which you allow him to remain, notice is not necessary, for against him the title is perfect without notice. But if he, availing himself of the possession as a means of obtaining credit, induces third persons to purchase from him as the actual owner, and they part with their money before your prior conveyance is notified to them, you must be postponed. In being postponed, your security is not invalidated; you had priority, but that priority has not been followed up, and you have permitted another to acquire a better title to the legal possession." His Honor then cited the position laid down by Lord *Eldon* in *Evans* v. *Bicknell*, and the *dicta* of Lord *Hardwicke*, Mr. Justice *Burnett*, Lord C. B. *Parker* and Lord C. J. *Lee* in *Ryall* v. *Rowles*, and observed, that he cited these as authorities to shew, that, in assignments of *choses en action*, notice to the legal holder has always been deemed necessary, and that it would be very dangerous for the solicitor of the purchaser to neglect it. *A solicitor who should neglect it, would find it difficult to make out, that he had not become responsible to his client.* His Honor also noticed the position of a text writer, (Cov. Pow. Mortg. 451, n.), as illustrating that the same opinion prevailed in the profession upon the point. In answer to the objection that Hall had not searched in the enrolment office, where he would have found memorials of the annuities, the Master of the Rolls observed, that Hall was not called upon by the nature of the transaction to make this search. The fund might have been transferred or incumbered without a memorial; and memorials would have been equally necessary, if the annuities had not been secured on the fund in question*.

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* A conclusive answer to the argument is, that the contents of the memorial do not necessarily disclose the nature of the security; for it has been decided that the deed, though it contain an assignment of stock,

or any of them, or any part thereof respectively, nor revoke or make void the power or authority hereinbefore

His Honor therefore dismissed the bill, but without costs. At the Rolls, 26th December, 1823, MS. An appeal was made against this decree, which was heard before Lord *Lyndhurst* on the 24th December, 1828, when his Lordship affirmed the decree of the Master of the Rolls.

Case of *Loveridge* v. *Cooper*.

The other case referred to is *Loveridge* v. *Cooper*, 3 Russ. 1, which came on before Sir *Thomas Plumer*, M.R., at the same time as *Dearle* v. *Hall*. His Honor, after observing that there was no solid ground for distinguishing the one from the other, stated the case and delivered his judgment as follows:—"In September, 1816, Richard Johnson had, under the will of his uncle, a contingent reversionary interest in one fourth of 6,250*l.* 4*l. per cent.* stock, dependent upon the event of his surviving the testator's widow, who had a life-interest in that and some other funds. In that month, Mr. and Mrs. Wright contracted with Richard Johnson for the purchase of an annuity, which, it was agreed, should be secured by a transfer of his contingent reversionary right. On the 5th of September the consideration-money was paid; the annuity was granted to trustees for Mr. and Mrs. Wright; and 700*l.* 4*l. per cent.* Bank Annuities, part of the stock to which the grantor was to become entitled on the death of the widow, was assigned to the same trustees for securing due payment. The stock was then standing in the name of Cooper, the surviving trustee and executor of the testator, but no immediate notice of the assignment was given to him. In 1818, the annuity fell into arrear; and in August, 1819, Mr. and Mrs. Wright and their trustees transferred the annuity to one Loveridge, who is represented as having become the purchaser of it for the same nominal sum which had been originally paid for it. It is somewhat difficult to conceive, how he could be induced to give that price, when we consider the irregularity of the past payments of the annuity, and the circumstances which had taken place in the meantime. The tenant for life of the fund died in April, 1821; and, upon that event, Richard Johnson became entitled to the 1,562*l.* 10*s.* stock. The case made on the part of the plaintiff is, priority of title under the assignment of September, 1816, and the subsequent conveyance, and he prays the assistance of the Court to prevent the stock from being transferred to Hodges, who is stated to claim under a subsequent assignment, and to compel a transfer of it to the plaintiff himself. The answer which Hodges makes is this: that, before the executor (in whose name the stock was standing,) had any notice of the assignment of September, 1816, he Hodges purchased the whole of

Purchaser preferred to earlier incumbrancers, on the ground of notice to trustees.

need not be otherwise described than as a "grant of annuity." *Vide ante*, Vol. 1, p. 335 *a*, 2nd ed.

OF DIVIDENDS, AND REVERSIONARY INTEREST OF STOCK.

given to the said [*mortgagee*], his executors, administrators, or assigns, without his or their consent in writing

Johnson's interest in the fund, had an assignment of it to him duly executed, and notified that assignment to Cooper, the trustee and executor. The assignment to Hodges was executed in December, 1816, and his solicitor was assured by Cooper, that he knew of no charge or incumbrance on the property. On the 28th March, 1817, a copy of the indenture of December, 1816, was delivered to Cooper on behalf of Hodges, verbal notice having been previously given. It appears, that, on the 29th April, 1818, notice was for the first time given to Cooper of the assignment of September, 1816; and, on that occasion, Cooper writes to Hodges a note, in which he states that he had received such a notice, (it was from Arrowsmith, one of the trustees to Mr. and Mrs. Wright); and that he had told Arrowsmith in reply, that there had been an assignment of the stock to Hodges, of which he, Cooper, had received notice long before. It is most extraordinary, that Arrowsmith should have received, in 1818, notice of the transfer to Hodges, and yet that, in the following year, the annuity should be sold for its full original price. Independently of that circumstance, however, this case cannot on principle be distinguished from the last. The purchase in September, 1816, not having been followed by notice, all the observations which I have before made on that subject apply to it. On the same principles on which I determined the other case, I must decide here, that Loveridge has made out no title to relief in a Court of equity." This decree was also appealed against, and received a similar confirmation from Lord *Lyndhurst* on the 24th December, 1828.

Remarks upon the doctrine of *Dearle* v. *Hall*, and *Loveridge* v. *Cooper*.

It is needless to enforce, by any observations, the necessity which these cases suggest of a proposed incumbrancer or purchaser of a fund, which is vested in trustees, ascertaining by communication with them, previously to advancing his money, whether there are any prior incumbrances*, and giving notice to them of his charge or assignment immediately on its completion. How far trustees will incur responsibility by their conduct under such circumstances, will remain to be determined. If they, after having had notice of existing incumbrances, represent the property as unincumbered, in answer to inquiries by an intended mortgagee or purchaser, *(of whose object in making the inquiries they are apprised)*, they would, no doubt, be held liable to the person to whom this misrepresentation is made; but all responsibility might, of course, be avoided, by a refusal to give any information, or at all events any positive assurance on the subject; this they would clearly be at liberty to do, and it seems to be their

* Possibly the trustees themselves may have a claim upon the fund. See *Priddy* v. *Rose*, 3 Mer. 86.

for that purpose first obtained: *And further* that the said [*mortgagor*] and [*wife*], and the executors or administrators of the said [*wife*], and every person whosoever lawfully claiming or to claim any right, title, or interest in and to the said dividends, annuities, and premises respectively hereby assigned and appointed, or intended so to be, will, from time to time and at all times hereafter, at his or their own costs and charges until the same premises shall be sold and assigned as aforesaid, and afterwards at the costs and charges of the purchaser or purchasers thereof, his, her, or their executors, administrators, or assigns, make, do, execute, and perfect every such lawful and reasonable act, deed, assignment or assurance in the law whatsoever, for more effectually assigning or otherwise assuring the said dividends, annuities, and other the premises respectively hereby assigned and appointed, or intended so to be, unto the said [*mortgagee*], his executors, administrators, or assigns, upon the trusts aforesaid, and for better enabling him or them to re-
* cover and receive the same; as by the said *mortgagee*], his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably advised and required: *And also*, that the said [*mortgagor*], his executors, or administrators, shall or will, so long as any sum or sums of money intended to be secured to the said [*mortgagee*], his executors, administrators, or assigns, by virtue of these presents, shall remain unpaid, duly and regularly pay the premiums and expenses to become payable in order to keep on foot the said hereinbefore recited policy of assurance, or in case the same or any policy of assurance to be effected as next hereinafter is mentioned shall be or by any means become void, shall and will effect in the said —— Assurance Office, or in some office of assurance in London or Westminster, to be approved of by the said

OF DIVIDENDS, AND REVERSIONARY INTEREST OF STOCK.

And for further assurance.

[*586]

— to keep on foot policy of assurance,

and if necessary effect a new insurance;

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only safe course, where they cannot confidently deny the fact of having received such a notice; and when it is considered that notice may have been orally given in the course of a conversation, and not (as it always ought to be) in writing, and may therefore easily have escaped recollection, too much caution cannot be exercised in representations to third persons upon the subject.

OF DIVIDENDS, AND REVERSIONARY INTEREST OF STOCK.

and deliver to mortgagee the receipts for the premiums;

and in case of default, mortgagee may keep assurance on foot;

and mortgagor will repay sums so paid with interest.

[*587]

That mortgagor

[*mortgagee*], his executors, administrators, or assigns, a similar policy of assurance in the name or names of the said [*mortgagee*], his executors, administrators, or assigns; and shall and will from time to time, within —— (*e*) days after the annual premium payable in respect of such assurance as aforesaid shall become due, pay the same, and deliver to the said [*mortgagee*], his executors, administrators, or assigns, the receipt for such premium; and in case default shall be made by the said [*mortgagor*], his heirs, executors, or administrators, in keeping on foot such assurance as aforesaid, or in delivering the receipt for the annual premium to become payable thereon in manner aforesaid, then, and in every such case, it shall be lawful for the said [*mortgagee*], his executors, administrators, or assigns, from time to time, so long as any sum or sums of money intended to be secured by virtue of these presents shall remain unpaid, to keep on foot such assurance as aforesaid; And the said [*mortgagor*], his executors or administrators, shall or will, within one calendar month, or sooner on demand thereof, pay unto the said [*mortgagee*], his executors, administrators, or assigns, such sum or sums of money as he or they shall pay or expend in or about such assurance, with interest for the same, after the rate of *5l. per cent. per annum*, from the time or respective times of paying or expending the same; and the several trusts, provisions, and declarations hereinbefore contained for securing the said sum of £ —— and the interest thereof, and the costs, charges, and expenses to be occasioned by the non-payment thereof, shall extend to and be available by the said [*mortgagee*], his executors, administrators, or assigns, for securing the sum and sums of money to be so paid or expended on account of the said assurance as aforesaid, and the interest thereof, and all costs, charges, and expenses occasioned by the non-payment thereof; but so nevertheless that the total amount of principal money to be ultimately recoverable by virtue of these presents shall not exceed the sum of £ ——; *And*

(*e*) It should be less than fifteen days, which is the period generally allowed by the insurance offices for the renewal of policies.

OF DIVIDENDS, AND REVERSIONARY INTEREST OF STOCK.

also, that the said [*mortgagor*] shall and will, at any time and from time to time, at the request of the said [*mortgagee*], his executors, administrators, or assigns, in person, as often as there shall be occasion, personally attend at any such office or place of assurance as aforesaid, and fairly and truly explain the state and condition of his health, and produce a certificate of his age, and give such references to medical men or others, and such other information, as shall be required of him, in order that an assurance may be effected on his life by the said [*mortgagee*], his executors, administrators, or assigns, pursuant to the covenant or agreement lastly hereinbefore contained; and shall not nor will do any act, or commit any default whatsoever, by means of which the said recited policy, or any policy or policies of assurance to be effected as aforesaid, shall be impeached or become void, or by reason whereof any additional premium or premiums of assurance may become payable beyond the usual rate or premium of assurance. AND *it is hereby further declared*, that the said [*mortgagee*], his executors, administrators, and assigns, shall hold the policy or policies of assurance to be effected pursuant to the covenant lastly hereinbefore contained, upon the same or the like trusts as are hereinbefore declared concerning the said recited policy of assurance. IN WITNESS, &c.

will attend at insurance office;

and not do any act to vacate the policy.

Mortgagee to hold policy upon trusts aforesaid.

INDEX TO THE NOTES

IN

VOL. V.

A.

'ACCUSTOMABLY YIELDEN,"
in stat. 32 Hen. 8, c. 28, how construed, 109.
ACQUIESCENCE.—*See* CONDITION.
ADMINISTRATION.—*See* LIMITED ADMINISTRATION.
ADVANCE.—*See* RENTS.
ADVANCEMENT,
(power of), whether exerciseable with consent of tenant for life after alienation, 563.
AFFIDAVIT.—*See* WEST INDIES.
ASSIGNEES.—*See* WIFE.
(in bankruptcy) disabled from purchasing, 333.
without order of Court, 329.
ASSIGNMENT.—*See* UNDERLEASE.
ATTORNEY.—*See* SOLICITOR.
AUCTION.—*See* TRUSTEE FOR SALE.
AUXILIARY
Securities, 496.

B.

BANKERS.—*See* FIRM.
BANKRUPTCY.—*See* WARRANT OF ATTORNEY.
BONDS,
inutility of, to accompany mortgages, 235.
BOND-DEBT,
when it may be tacked to a mortgage, 402.

C.

CESSER OF TERM,
in mortgage, 239.
CHARGE
of debts upon lands, what expressions amount to, 372.
when mortgagee affected by charge of debts and legacies, 373.
suggestion as to mode of preparing mortgages under such circumstances, 375.
CHOSES EN ACTION,
of wife, how far alienable by husband, 566.
COLLIERY.—*See* MINE.
COMMITTEE.—*See* LUNATIC.
CONCEALMENT,
by mortgagee, when a ground for postponement, 425.
CONDITION,
effect of delay and acquiescence as a waiver of, 88.
of license to carry on a particular trade, 88.
form of, in leases by tenants in common, 100.
CONSIDERATIONS, (NOMINAL),
as to, 453.
CONSIGNMENTS.—*See* COVENANT.
CONTRIBUTION
to mortgage debt, principle regulating, 495.
CONVERSION.—*See* TRUST FOR SALE.
COPARCENERS,
leases by, 95.
COPYHOLDS,
what construed to be a demise of, 80.
not within registry acts, 215.
as to mortgages of, 233, 352.
question, where comprised in same security with freeholds, 496.
COSTS,
securities for, 364.
COVENANTS
by tenants in common, 106.
what are "usual" covenants in a lease, 137.
for further assurance in a mortgage, proper form of, 276, 512.
for title, how to be framed, 384.
to pay principal and interest, 525.
construction of, distributively, 392.

COVENANTS (*continued*).
to consign produce, in West India mortgage, 540.
not to call in mortgage money, as to, 526.—*See* TENANTS IN COMMON, INTEREST.

D.

DEBTS.—*See* CHARGE.
not revived by trust to pay, 375.
DEEDS.—*See* TITLE DEEDS.
DEFICIENCY.
in stipulated quantity, mode of reserving rent for, 34, 191, 192.
DEMISE,
mortgage by, 232, 407.
DEPOSIT SECURITIES,
dangers of, 415, 471.
law respecting them, 461.
DEPOSITARY OF LEASE,
bound to take an assignment, wh ere, 321.
DEVISEE,
taking subject to debts or legacies, mortgages by, 373, 375.
of equity of redemption, as to, 432.
DISTRESS,
landlord's power of, at the end of term, 73.
power of distress for recovery of interest on mortgages, 528.
See GROWING CROPS.
DOWER,
when excluded by assignment of term, 481.

E.

EAST INDIES.—*See* LETTER OF ATTORNEY.
EMBLEMENTS,
tenant's right to, 70.
EQUITABLE MORTGAGE.—*See* DEPOSIT SECURITIES.
EQUITY OF REDEMPTION,
mortgages of, 425.—*See* REDEMPTION, EXTINGUISHMENT.
ESTOVERS,
as to, 117.
EXECUTION-CREDITOR,
bound to pay a year's rent to landlord, 73.
how to proceed as to growing crops, 77.

EXECUTION-CREDITOR (*continued*).
may purchase of sheriff, 339.
EXECUTOR,
purchase by, set aside, 332.
EXTINGUISHMENT,
of mortgage debt, by purchase of equity of redemption, 431.

F.

FEE FARM RENT.—*See* RENT-CHARGE.
FINE,
with mortgage, 280.
FIRE INSURANCE,
should extend to loss of rent, 98.
construction of covenant to insure, and suggestion in regard to, 105.—*See* INSURANCE.
FIRM,
(banking or mercantile), mortgages to, 287.
effect of alterations in, 298.
further charges as to, 404, 405.

G.

GROWING CROPS,
may be distrained by landlord, 75.
disposal of, when taken in execution, 77.

H.

HABENDUM,
suggestion as to, 124.
HUSBAND AND WIFE,
mortgages by, 278, 286.
assignment of her *choses en action*, 566.
See LEASES.

I. J.

IMPROVED VALUE,
whether landlord, under covenant to pay taxes, is liable in respect of, 91.

INSURANCE,
monies advanced for, requires an additional stamp in mortgages, where, 243.
against fire, modes of providing for, in mortgages, 303.—*See* FIRE INSURANCE.
INTEREST,
as to clauses in mortgages for the reduction of, on punctual payment, 318.
parol agreement for reduction of, 437.
how calculated in accounts between mortgagor and mortgagee, 387.
cannot be turned into principal, where, 428.
ceases on tender of principal, after notice, 445.
whether it can be received in advance, 447.
made recoverable by distress, 528.
rate of, in Ireland, and West Indies, 540.
INVESTMENT,
of money arising from sale, 457.
JOINT (AND SEVERAL)
power of attorney, how construed, 179.
JOINT TENANTS,
leases by, 93.
JUDGMENT,
against several persons, as to, 483.
effect of bankruptcy upon, 487.
may be tacked to mortgages, where, 426, 431.
See WARRANT OF ATTORNEY.

L.

LACHES.—*See* CONDITION.
LANDLORD.—*See* EXECUTION-CREDITOR.
LEASES,
to several persons, 86.
should be noticed in mortgages, 250.
See HABENDUM, MINES, POWERS, RENT.
LEASES FOR A YEAR,
in West India mortgages, as to, 543.
LEGAL ESTATE,
necessary to perfect mortgagee's security, 414.
LESSEE,
whether entitled to remove crops, machinery, &c., at the end of term, 43.

LETTER OF ATTORNEY,
what a revocation of, and its effect, 138, 139, 140.
construction of, 140, 179.
when required to be by deed, 141.
need not be registered, when, 155.
stamps on, 181.
authentication of, when to be used in the West Indies, 144.
East Indies, 146.
United States, 159.
LICENSE,
to use patent, whether it may be granted to more than five persons, 188.—*See* CONDITION.
LICENSE, LETTER OF,
suggestions in regard to, 199, 200.
LIMITED ADMINISTRATIONS,
where necessary, and observations on, 201, 207.
LIFE INTEREST,
effect of alienation of, upon powers to be exercised with consent of tenant for life, 563.
LIQUORS.—*See* PUBLIC-HOUSE.
LUNATICS,
committee of, leases by, 114.

M.

MACHINERY,
question in regard to, between landlord and tenant, 44.
MARSHALLING
assets in favour of mortgagees, &c., 496.
MAYOR'S CERTIFICATE,
as to, 151.
MEMORIALS
of deeds in Middlesex, 211.
Yorkshire, 217.
some points respecting, 218.
MESNE INCUMBRANCER,
liable to be excluded, where, 427.
MIDDLESEX.—*See* MEMORIAL.
MINES,
whether leases of, extend to unopened mines, 17.—*See* LESSEE.
MOIETIES,
limitation of lands to mortgagees in, 390.

MORTGAGE MONEY,
to what representatives payable, 280.—*See* INTEREST, NOTICE, PROVISO FOR REDEMPTION.
MORTGAGEES,
leases by and to, 84.
precautions to be observed by, 250, 312, 320, 323.
allowed costs of renewal, 314.
and repairs, 312.
where empowered to sell, cannot purchase under the power, 329.
modes of framing mortgage, where money is advanced by mortgagees in certain proportions, 375, 390, 392.
in possession, how to apply rents, 387, 433.
first and second, their relative situation and rights, 425, 429, 433.
acquiring equity of redemption, effect of, 432.—*See* REDEMPTION.
MORTGAGES,
comparative eligibility of various modes of mortgage-securities, 232.
MORTGAGOR,
as to giving him power to lease, 84, 250, 254.
not accountable for by-gone rents, 386.—*See* REDEMPTION.

N.

NOTICE
of payment of mortgage money, as to, 445, 448.
where not necessary, 447.
notice of incumbrances, at what time material, 430.
to trustees, its effect in giving priority, 579.—*See* INTEREST.

P.

PARTNERS,
as to leases to, 85.
powers of attorney to and by, 142, 153.
PASTURE,
waste by conversion of, 4.
covenant not to plough, 98.
PATENT (LETTERS),
proviso in restraining assignment, how construed, 189.
PLACE OF PAYMENT.—*See* PROVISO FOR REDEMPTION.

POWERS,
utility of powers of leasing in mortgages, 16, 84, 253, 254.
effect of alienation by person required to give consent, 563.
of sale.—*See* TRUST FOR SALE.
PRE-EMPTION,
covenant for, in leases, 108.
in mortgages, 512.
PRIORITY
among incumbrancers, as to, 408, 429, 579.
PROVISO FOR REDEMPTION,
form of, where principal is to remain a given time upon the security, 239.
where followed by a trust for sale, 260.
where a mortgage is made of a wife's estate, 278.
should name a place of payment, 524.—*See* REDEMPTION.
PUBLIC-HOUSE,
as to covenants to purchase liquors of lessor, 87.
PURCHASES (CONDITIONAL),
how to be distinguished from mortgages, 513.—*See* EXTINGUISHMENT.
PURCHASE-MONEY,
as to mortgages to secure, 451.

R.

RECEIVER,
appointment of, 433.
RECITAL
of time and place of baptisms, marriages, deaths, &c., suggested, 245.
REDDENDUM.—*See* RENT.
REDEMPTION,
where there are several mortgages by and to same person, 400.
right to, how affected by concealment of prior incumbrances, 433.
cannot be restrained by agreement, 510.
whether allowed to mortgagor before period appointed by proviso, 526.—*See* PROVISO FOR REDEMPTION.
RELEASE,
inutility of, in addition to an appointment, 255.
RENEWAL,
obligation of mortgagor and mortgagee in regard to, 314.—*See* STAMP.

RENTS,
payable in advance, as to, 3, 73, 74.
mode of reservation to trustees or mortgagees for a term, 83.
tenants in common, 94, 97.
tenants in tail, 110.
husband and wife, 110.
tenant for life and remainder-man, 111.
executors or administrators, 111.
trustees for charity, 111.
committee of lunatic, 115.
guardians, 117.
pass as incident to reversion without being mentioned, 308.
as to right of first and second mortgagees to, 433.
deposit creditor, 472.
See DEFICIENCY, FIRE INSURANCE, LANDLORD, MORTGAGEES.
RENT-CHARGE,
mortgages of, 380.
RESTS,
whether made in accounts between mortgagor and mortgagee in possession, 387.
REVERSIONARY
chose en action of wife, alienation of, 566.
ROYALTIES,
different modes of reserving, 30, 35.

S.

SALE,
produce of, to what representatives of mortgagor payable, 292.
See TRUST FOR SALE.
SECOND MORTGAGEE,
his situation, 425, 433.
SET OFF
by tenant for crops against landlord's claim for rent, 15.
SETTLEMENT.—*See* WIFE.
SHERIFF.—*See* EXECUTION-CREDITOR, GROWING CROPS.
SOLICITORS
disabled from purchasing, when, 337.
as to securities to, for costs, 364.
STAMP,
on mortgages, whether it covers costs, 262.
expenses of renewal, 314.
insurance, 240.

STAMP (*continued*).
how imposed where to secure stock, 273.
question in regard to, where mortgage is to a fluctuating firm, 287.
whether certain words in a bond operated as a limitation of amount, so as to restrict stamp, 292.
how payable, where money is advanced by several persons in certain proportions, 379.
where purchase and mortgage are blended, 451.
STATUTES,
Landlord and tenant (8 Ann. c. 14, ss. 6, 7), 73; (11 Geo. 2, c. 19, s. 8), 75; (56 Geo. 3, c. 50), 77; (32 Hen. 8, c. 28), 108.
Recovery of colonial debts (5 Geo. 2, c. 7), 144.
Middlesex and Yorkshire registry acts, 211, 217.
Redemption of mortgages (4 & 5 W. & M. c. 10), 433.
Interest in West Indies (14 Geo. 3, c. 19; 3 Geo. 4, c. 47), 536.
STATUTE OF LIMITATIONS
does not run on debts payable out of a trust fund, 375.
STOCK,
mortgage to secure the transfer of, how to be stamped, 274.
SURVIVORSHIP
among lessees, 86.
mortgagees, 266.

T.

TACKING,
doctrine of, 402, 426.
does not apply to conveyances in trust for sale, 428.
TAXES.—*See* IMPROVED VALUE.
TENANTS IN COMMON,
leases by, 93.
reservation of rent to, 97.
covenants with, 100, and by, 106.—*See* CONDITION.
TENDER,
of mortgage money, what amounts to, 446.
TERMS OF YEARS,
to attend the inheritance, possession of deeds respecting, 416.
should be assigned, 417, 480.
most eligible mode of assigning, 479.

TERMS OF YEARS (*continued*).
exclude dower, when, 481.
doctrine of presuming surrender of, 481.
TITLE DEEDS,
should be expressly granted in mortgages by demise, 407.
importance of possession of, 407.
how far possession of them gives priority, 408, 415, 416.
not recoverable by mortgagee who has parted with them, 412.
See DEPOSIT SECURITY.
TRADE.—*See* CONDITION.
TRUSTEES,
mortgage to, 266.
their disability to purchase, 329.
whether rule extends to trustees having only a dry legal estate, 331.
dealings not within the rule, 339.
notice of incumbrances should be given to them, 579.
its effect in conferring priority, 579.
their duty in respect of, 585.
TRUST FOR SALE,
advantages of, 234.
does not preclude the usual order in bankruptcy, 329.
generally now vested in mortgagee himself, 393.
distinction, where in third persons, 393.
whether it can be exercised by an alienee, 442.
under-leases containing, as to, 502.
TRUSTEE FOR SALE,
should be empowered to purchase in property at auction, 261.
can make a good title to a purchaser, 294.
cannot sell to himself, 329.
as principal or agent, 335.
but may purchase of *cestui que trust*, 334.
allowed improvements where sale set aside, 336.
restrained from selling, when, 393.
should examine title before sale, 394.

U. V.

UNDER-LEASE,
advantages of mortgages by way of, instead of assignment, 233, 320.
proper form of, 321.
as to trust for sale in, 232, 343, 502.

UNITED STATES.—*See* LETTER OF ATTORNEY.
VENDOR.—*See* PURCHASE-MONEY.

W.

WARRANT OF ATTORNEY,
as a collateral security, 235.
effect of bankruptcy upon, 236, 487.
to confess judgment in ejectment, 529.
WASTE,
by conversion of land, 4, 117.
WEST INDIES,
recovery of debts in, 144.
form of affidavit for, 146.
rate of interest payable in, 536.
foreclosure of mortgage in, 544.—*See* CONSIGNMENT, LETTER OF ATTORNEY.
WIFE,
mortgages by, 278.
her claim on her husband's estate, in respect of, 286.
her equity to a settlement, 573.
wife's equitable *chose en action*, situation of mortgagee of, 575.
See HUSBAND AND WIFE.

Y.

YORKSHIRE.—*See* MEMORIAL.

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